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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL A. NEWDOW, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the inclusion of the phrase "under God" in the Pledge of Allegiance to the United States Flag violates the Establishment Clause of the First Amendment.

2. Whether a noncustodial parent, who lacks the legal authority to determine his child's education or religious upbringing, has Article III standing to challenge educational practices undertaken by the school in which the custodial parent has chosen to place the child.

PARTIES TO THE PROCEEDING

The respondents are Michael A. Newdow, who was the plaintiff below, and the Elk Grove Unified School District and its Superintendent, David W. Gordon, who were defendants below. The Complaint also named as defendants the United States Congress, President George W. Bush,* the Sacramento City Unified School District, and its superintendent, Jim Sweeney. All of those defendants were dismissed from the case by the court of appeals. App., *infra*, 5a-8a. The Complaint also named the State of California as a defendant, but the State did not participate in the district court proceedings or in the court of appeals, until the rehearing stage, at which point the court of appeals rejected the State's appearance. *Id.* at 6a. The motions of Sandra Banning, the mother of respondent Newdow's child, and the United States Senate to intervene were denied by the court of appeals. *Id.* at 99a-109a.

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* The Complaint originally listed President William J. Clinton as a defendant. Pursuant to Federal Rule of Appellate Procedure 43(c)(2), President Bush was substituted as his successor in office.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals on rehearing (App., *infra*, 1a-24a) is reported at 321 F.3d 772. The original opinion of the court of appeals (App., *infra*, 25a-58a) is reported at 292 F.3d 597, and the court's subsequent opinion on standing (App., *infra*, 89a-98a) is reported at 313 F.3d 500. The opinion and orders of the court denying intervention (App., *infra*, 99a-109a) are reported at 313 F.3d 495 and 313 F.3d 506. The order of the district court (App., *infra*, 110a), adopting the Findings and Recommendation of

the magistrate judge that the case be dismissed (App., *infra*, 111a-112a), is unreported.

JURISDICTION

The court of appeals entered its original judgment on June 26, 2002. The court issued an amended opinion on rehearing on February 28, 2003. The court of appeals issued an order staying its mandate on March 4, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

No federal statute waives the sovereign immunity of the United States of America from a suit for declaratory or injunctive relief under the First Amendment, and thus the jurisdictional basis for respondent Newdow's suit against the United States is unclear.[1] However, the absence of such a waiver is without jurisdictional consequence in this case because the United States could have, and should hereby be deemed to have, intervened as of right in this action against the school district and its superintendent to defend the constitutionality of the Pledge of Allegiance against Newdow's facial and as-applied challenges. See 28 U.S.C. 2403(a).[2]

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[1] Other than a separate claim against the President in his official capacity, Newdow did not sue an officer or an agency of the United States, so his claim does not appear to fall within the scope of either *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), or the Administrative Procedure Act, 5 U.S.C. 552. Nor is his federal constitutional claim cognizable under the Federal Tort Claims Act, 28 U.S.C. 1346, 1402, 2671 *et seq.* See *FDIC* v. *Meyer*, 510 U.S. 471, 477 (1994).

[2] Newdow's as-applied challenge to the recitation of the Pledge in elementary schools calls into question the federal government's practice under which the nearly 2500 military dependents attending its four schools within the Ninth Circuit are led in a voluntary recitation of the Pledge of Allegiance daily.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law respecting an establishment of religion. * * *"

Section 4 of Title 4 of the United States Code provides that the Pledge of Allegiance to the United States Flag shall be: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all."

STATEMENT

1. In 1942, as part of an overall effort to "codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America," Congress enacted a Pledge of Allegiance to the United States flag. H.R. Rep. No. 2047, 77th Cong., 2d Sess. 1 (1942); S. Rep. No. 1477, 77th Cong., 2d Sess. 1 (1942). As originally enacted, the Pledge of Allegiance read: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Act of June 22, 1942, ch. 435, § 7, 56 Stat. 380.

Twelve years later, Congress amended the Pledge of Allegiance by adding the words "under God" after the word "Nation." Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249. Accordingly, the Pledge now reads: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. 4.

In amending the Pledge, the Committee Reports noted that, "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H.R. Rep. No. 1693, 83d Cong., 2d Sess. 2 (1954); see also S.

Rep. No. 1287, 83d Cong., 2d Sess. 2 (1954) ("Our forefathers recognized and gave voice to the fundamental truth that a government deriving its powers from the consent of the governed must look to God for divine leadership. * * * Throughout our history, the statements of our great national leaders have been filled with references to God."). Both Reports traced the numerous references to God in historical documents central to the founding and preservation of the United States, from the Mayflower Compact to the Declaration of Independence to President Lincoln's Gettysburg Address, the latter having employed the same reference to a "Nation[] under God." H.R. Rep. No. 1693, *supra*, at 2; S. Rep. No. 1287, *supra*, at 2.

The Reports further explained that the amendment would highlight a foundational difference between the United States and Communist nations: "Our American Government is founded on the concept of the individuality and the dignity of the human being" and "[u]nderlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp." H.R. Rep. No. 1693, *supra*, at 1-2; see also S. Rep. No. 1287, *supra*, at 2. As amended, the Pledge would thus textually reject the "communis[t]" philosophy "with its attendant subservience of the individual." H.R. Rep. No. 1693, *supra*, at 2; see also S. Rep. No. 1287, *supra*, at 2 ("The spiritual bankruptcy of the Communists is one of our strongest weapons in the struggle for men's minds and this resolution gives us a new means of using that weapon."). The House Report further noted that, through "daily recitation of the pledge in school," "the children of our land * * * will be daily impressed with a true understanding of our way of life and its origins," so that "[a]s they grow and advance in this understanding, they will assume the responsibilities of self-government equipped

to carry on the traditions that have been given to us." H.R. Rep. No. 1693, *supra*, at 3.

Both the Senate and House Reports expressed the view that, under controlling precedent from this Court, the amendment "is not an act establishing a religion or one interfering with the 'free exercise' of religion." H.R. Rep. No. 1693, *supra*, at 3 (citing *Zorach* v. *Clauson*, 343 U.S. 306 (1952)); see also S. Rep. No. 1287, *supra*, at 2.[3]

2. California law requires that each public elementary school in the State "conduct[] * * * appropriate patriotic exercises" at the beginning of the school day. Cal. Educ. Code § 52720 (West 1989). The law provides that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section." *Ibid.* In satisfaction of that statutory requirement, respondent Elk Grove Unified School District (Elk Grove) has adopted a policy that directs each of its elementary schools to "recite the pledge of allegiance to the flag once each day." App., *infra*, 27a. No child is compelled to join in reciting the Pledge. *Id.* at 28a.

Respondent Michael Newdow is the noncustodial father of a child enrolled in a public elementary school within the jurisdiction of respondent Elk Grove. App., *infra*, 2a, 90a-91a. In the school that Newdow's daughter attends, the teacher leads the students in reciting the Pledge of Allegiance daily. *Id.* at 3a.

The child's mother has "*sole* legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of" the child. App., *infra*, 90a-91a. While Newdow, who was never married to the child's

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[3] Following the court of appeals' decision in the instant case, Congress reaffirmed the content of the Pledge of Allegiance and Congress's view that the legislation is constitutional. Act of Nov. 13, 2002, Pub. L. No. 107-293, 116 Stat. 2059.

mother, retains limited visitation rights, the right to access the child's school and medical records, and the right to "consult" on "substantial" decisions pertaining to the child's "educational needs," if the parents disagree, the child's mother "may exercise legal control of" the child as long as it "is not specifically prohibited or inconsistent with the physical custody order." *Id.* at 91a.

In March 2000, Newdow filed suit against the President, the United States Congress, the United States of America, the State of California, and two California school districts and their superintendents, seeking a declaration that the 1954 statute adding the words "under God" to the Pledge is "facially unconstitutional" under the Establishment and Free Exercise Clauses of the First Amendment. Compl. 6, 36; App., *infra*, 4a-5a. He also sought injunctive relief requiring Congress and the President to remove those words from the Pledge and prohibiting California schools from leading students in reciting the Pledge. Compl. 37; App., *infra*, 4a-5a. The Complaint explains that Newdow's child is "an unnamed plaintiff whom he represents as 'next friend.'" Compl. 3. The Complaint asserts that the recitation of the Pledge in his child's school "results in the daily indoctrination of the Elk Grove Unified School District's students—including Plaintiff's daughter—with religious dogma," *id.* at 18-19, and that such actions "infringe[]" upon Newdow's "unrestricted right to inculcate in his daughter— free from governmental interference—the atheistic beliefs he finds persuasive." *Id.* at 20; see also *id.* at 36. The Complaint further asserts that Newdow's "position as the father of a child attending the State's public schools grants him standing in this matter in his own right and on behalf of his daughter." *Id.* at 26.

The district court dismissed the complaint for failure to state a claim, relying on numerous decisions of this Court expressly addressing the Pledge and describing it as con-

sistent with the Establishment Clause, as well as on a decision of the Seventh Circuit rejecting a similar challenge to the Pledge. App., *infra*, 110a-112a (adopting magistrate judge's Findings and Recommendation, which cites *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989); *id.* at 625 (O'Connor, J., concurring); *Lynch* v. *Donnelly*, 465 U.S. 668 (1984); *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203 (1963) (Brennan, J., concurring); *Sherman* v. *Community Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992), cert. denied, 508 U.S. 950 (1993)).

3. a. A divided panel of the Ninth Circuit affirmed in part and reversed in part. App., *infra*, 25a-58a. As an initial matter, all three members of the panel agreed that the President and Congress should be dismissed from the lawsuit, on the grounds that the President is not a proper defendant for challenging the constitutionality of a federal law under *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992) (plurality opinion), and that the Congress cannot be sued under the Speech and Debate Clause, U.S. Const. Art. I, § 6, Cl. 1. See App., *infra*, 29a-30a; *id.* at 53a (Fernandez, J., concurring and dissenting). The court also ruled that Newdow lacked standing to file suit against the Sacramento City Unified School District and its superintendent "because his daughter is not currently a student there." *Id.* at 32a.

The court did conclude, however, that Newdow has standing to challenge Elk Grove's policy of reciting the Pledge "because his daughter is currently enrolled in elementary school" in Elk Grove. App., *infra*, 32a. In addition, a majority of the court concluded that Newdow has standing in his own right to challenge the facial constitutionality of the 1954 Act amending the Pledge because "the mere enactment of a statute may constitute an Establishment Clause violation," *id.* at 33a, and the 1954 Act amounts to a "religious recitation

policy that interferes with Newdow's right to direct the religious education of his daughter." *Id.* at 37a.[4]

b. Turning to the merits of Newdow's complaint, the majority held that, with the addition of the phrase "under God," the Pledge of Allegiance violates the Establishment Clause. App., *infra*, 37a-42a. The majority began by explaining that this Court has adopted three different tests to analyze Establishment Clause violations (*id.* at 37a)—the three-prong test outlined in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); the "endorsement test," *County of Allegheny*, *supra*; and the "coercion" test, *Lee* v. *Weisman*, 505 U.S. 577 (1992)—and that the court of appeals was "free to apply any or all of the three tests, and to invalidate any measure that fails any one of them." App., *infra*, 41a.

The majority held that the 1954 Act and the school district policy failed the "endorsement test" both because the Pledge's reference to God "is a profession of a religious belief, namely, a belief in monotheism" and because it "impermissibly takes a position with respect to the purely religious question of the existence and identity of God." App., *infra*, 41a-42a. The majority further concluded that the 1954 Act and the school district's policy fail the "coercion test" because "the mere fact that a pupil is required to listen every day to the statement 'one nation under God' has a coercive effect." *Id.* at 45a.

Finally, the majority concluded that the Pledge fails the *Lemon* test because it has the purpose of advancing religion. App., *infra*, 46a. In so holding, the majority rejected the United States' argument that the Pledge should be looked at "as a whole," and concluded that the "*sole* purpose" of the 1954 Act was to "advance religion, in order to differentiate

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[4] The court did not address the constitutionality of the California law requiring patriotic exercises in elementary school classrooms. App., *infra*, 30a-31a.

the United States from nations under communist rule." *Id.* at 46a-47a. The majority further concluded that Elk Grove's policy ran afoul of the *Lemon* test because it "convey[s] an impermissible message of endorsement to some and disapproval to others of their beliefs regarding the existence of a monotheistic God." *Id.* at 50a.

The majority dismissed in a footnote the numerous statements by this Court and its Members expressly addressing the Pledge and affirming its constitutionality as "dicta" that was announced without "appl[ying] any of the three tests to the Act." App., *infra*, 50a-51a n.12. The majority also expressly disagreed with the analysis and conclusion of the Seventh Circuit in *Sherman*, *supra*, which upheld the Pledge against a similar Establishment Clause challenge. *Ibid.*

c. Judge Fernandez dissented. App., *infra*, 52a-58a. Judge Fernandez first expressed his "serious misgivings" about the majority's conclusion that Newdow had standing to challenge the facial constitutionality of the 1954 Act, but ultimately concluded that the question "makes little difference to the resolution of the First Amendment issue in this case." *Id.* at 53a n.1. With respect to the Establishment Clause challenge, Judge Fernandez explained that "such phrases as 'In God We Trust,' or 'under God' have no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity." *Id.* at 55a. Judge Fernandez also noted that this Court has repeatedly indicated that the Pledge's text, as amended, does not violate the Establishment Clause, and he agreed with the Seventh Circuit that the court of appeals should "respect" those assurances: "If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so." *Ibid.* (quoting *Sherman*,

980 F.2d at 448). Finally, Judge Fernandez accused the majority of confining itself to legal "elements and tests, while failing to look at the good sense and principles that animated those tests in the first place." *Id.* at 57a; see also *id.* at 57a n.8 (noting that the majority's holding would preclude use of many patriotic songs, such as "God Bless America," "America the Beautiful," "The Star Spangled Banner," and "My Country 'Tis of Thee," in public ceremonial occasions).

d. While the case was pending on the United States' and Elk Grove's petitions for rehearing and rehearing en banc, the mother of Newdow's child notified the court that Newdow lacked legal custody of the child and legal control over the child's educational and religious upbringing. She further advised that, as the custodial parent, she "wish[es] for her child to be able to recite the Pledge at school exactly as it stands." Banning C.A. Mot. to Intervene 10. The United States then filed a motion to enlarge the record and a supplemental brief arguing that Newdow lacks standing to prosecute his challenge to the Pledge on its face or as applied by Elk Grove.

The court of appeals issued a separate decision holding that Newdow has standing to prosecute his constitutional challenge to the Pledge. App., *infra*, 89a-98a. The court concluded that, while Newdow no longer could prosecute the action on behalf of or to vindicate the interests of his child, Newdow continued to have standing in his own right to challenge "unconstitutional government action affecting his child." *Id.* at 92a. The court noted that the custody agreement does not strip Newdow of all of his parental rights, because he retains the "the right to inspect his daughter's school and medical records" and the "right to consult" on educational decisions, albeit with the mother "having ultimate decision-making power." *Id.* at 95a. The court then reasoned that, because California law recognizes a right in

noncustodial parents to "expose" their children to their beliefs and values, Newdow was injured because state law "surely does not permit official state indoctrination of an impressionable child on a daily basis with an official view of religion contrary to the express wishes of *either* a custodial or noncustodial parent." *Id.* at 96a. The court further reasoned that Newdow has standing because the mother "has no power, even as sole legal custodian, to insist that her child be subjected to unconstitutional state action." *Ibid.* Because the Pledge, in the court's view, "provides the message to Newdow's young daughter" that "her *father's* beliefs are those of an outsider, and necessarily inferior to what she is exposed to in the classroom," the court concluded that Newdow has suffered a legally cognizable injury that provides him with Article III standing. *Id.* at 97a.[5]

4. a. The court issued an amended opinion on rehearing. App., *infra*, 1a-24a. In its amended opinion, the court limited its Establishment Clause holding to the Pledge's use by Elk Grove in its schools. *Id.* at 18a. With respect to Newdow's challenge to the facial constitutionality of the Pledge, the court of appeals vacated the district court's decision in favor of the United States and remanded "for further proceedings consistent with our holding." *Ibid.*

In addition, the court amended its decision to hold only that Elk Grove's policy violated the coercion test, and did not address either the "endorsement test" or the *Lemon* test. App., *infra*, 11a. The panel, however, concluded that the recitation of the Pledge violated the coercion test for the same reasons that the original opinion found a violation of the endorsement test. Compare *id.* at 11a-13a, with *id.* at 41a-43a.

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[5] Judge Fernandez concurred in the judgment on standing, but not in the majority's "allusions to the merits of the controversy." App., *infra*, 98a.

The court also elaborated on its rejection of the numerous statements in this Court's opinions affirming the constitutionality of the Pledge and similar official acknowledgments of the Nation's religious heritage. The court assumed that "public officials do not unconstitutionally endorse religion when they recite the Pledge," but that schools nevertheless could not "coerce impressionable young schoolchildren to recite it, or even to stand mute while it is being recited by their classmates." App., *infra*, 15a. The court also purported to distinguish references to God in the Pledge from those in the Declaration of Independence and National Anthem on the ground that the pledge "is a performative statement." *Id.* at 16a; see also *ibid.* ("To pledge allegiance to something is to alter one's moral relationship to it, and not merely to repeat the words of an historical document or anthem.").

Judge Fernandez dissented from the court's Establishment Clause holding for the same reasons discussed in his initial dissenting opinion. App., *infra*, 19a-24a. Judge Fernandez also noted that, although the majority "now formally limits itself to holding that it is unconstitutional to recite the Pledge in public classrooms, its message that something is constitutionally infirm about the Pledge itself abides and remains a clear and present danger to all similar public expressions of reverence." *Id.* at 19a n.1.

b. Judge O'Scannlain, joined by Judges Kleinfeld, Gould, Tallman, Rawlinson, and Clifton, filed a lengthy dissent from the court of appeals' denial of rehearing en banc. App., *infra*, 67a-87a. He described the panel opinion as

> wrong, very wrong—wrong because reciting the Pledge of Allegiance is simply not "a religious act" as the two-judge majority asserts, wrong as a matter of Supreme Court precedent properly understood, wrong because it

> set up a direct conflict with the law of another circuit, and wrong as a matter of common sense.

Id. at 67a-68a (footnote omitted). Judge O'Scannlain stressed that this Court consistently has distinguished between "patriotic invocations of God on the one hand," and public school "prayer, an 'unquestioned religious exercise.'" *Id.* at 72a. Judge O'Scannlain further noted that, until the panel's decision here, "[n]o court, state or federal, has *ever* held, even now, that the Supreme Court's school prayer cases apply outside a context of state-sanctioned formal religious observances." *Id.* at 78a-79a. Finally, Judge O'Scannlain noted that, while the panel "adopts a stilted indifference to our past and present realities as a predominantly religious people," *id.* at 86a-87a, "the Supreme Court has displayed remarkable consistency—patriotic invocations of God simply have no tendency to establish a state religion," *id.* at 86a.

Judges McKeown, Hawkins, Thomas, and Rawlinson separately dissented from the denial of rehearing en banc on the ground that the case "presents a constitutional question of exceptional importance" that should be heard by the court en banc. App., *infra*, 88a.

REASONS FOR GRANTING THE PETITION

Two decisions of this Court have said without qualification that the Pledge of Allegiance is constitutional. Numerous other opinions, joined in by at least twelve Justices of this Court, have likewise expressly addressed and affirmed the constitutionality of the Pledge of Allegiance notwithstanding its reference to God. No Justice has expressed the view that the Pledge violates the Establishment Clause. The court of appeals, however, dismissed those majority and separate opinions as unconsidered dicta. But a fair reading of this Court's decisions demonstrates that those consistent and oft-repeated statements stand as a fixed lodestar in this Court's

Establishment Clause jurisprudence that has informed and directed the resolution of a number of the Court's cases. They reflect a point of exceptional unity and consistent agreement among Members of this Court within Establishment Clause jurisprudence. Whatever else the Establishment Clause may prohibit, this Court's precedents make clear that it does not forbid the government from officially acknowledging the religious heritage, foundation, and character of this Nation. That is what the reference to God in the Pledge of Allegiance does. The Pledge is therefore constitutional, as the Seventh Circuit held when confronted with the same Establishment Clause challenge. Because the court of appeals' error is so manifestly contrary to precedent, the Court may wish to consider summary reversal of the decision below.

1. This Court's review is warranted because the court of appeals' holding conflicts with repeated opinions of this Court and of individual Justices consistently explaining that the Pledge of Allegiance, and similar official acknowledgments of the Nation's religious heritage and character, do not violate the Establishment Clause. The holding below is also in direct conflict with the Seventh Circuit's decision in *Sherman* v. *Community Consolidated School District 21*, 980 F.2d 437 (1992), cert. denied, 508 U.S. 950 (1993), which rejected the same Establishment Clause challenge to the Pledge.

a. The court of appeals' decision is irreconcilable with this Court's repeated assurances that the Pledge of Allegiance, with its reference to God, comports with the strictures of the Establishment Clause. In *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), the Court held that a city did not violate the Establishment Clause by including a nativity scene as part of a Christmas display. In upholding the display, the Court reasoned that "[t]here is an unbroken history of official acknowledgment by all three branches of government

of the role of religion in American life from at least 1789." *Id.* at 674. The Court noted that its own opinions had "asserted pointedly" that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Id.* at 675 (quoting *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952), and citing *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 213 (1963)). The Court further reasoned that "examples of reference to our religious heritage are found * * * in the language "One nation under God," as part of the Pledge of Allegiance to the American flag," which "is recited by many thousands of public school children—and adults—every year." *Lynch*, 465 U.S. at 676; see also *ibid.* (referring favorably to the National Motto, "In God We Trust," 36 U.S.C. 302, which appears on all United States currency, 31 U.S.C. 324).

Explaining that such official acknowledgments of our Nation's religious heritage do not "establish[] a religion or religious faith, or tend[] to do so," *Lynch*, 465 U.S. at 678, the Court concluded that the City's inclusion of a creche in its Christmas display likewise permissibly "depicts the historical origins of this traditional event long recognized as a National Holiday," *id.* at 680. To hold otherwise, the Court explained, would lead to the conclusion that "a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution." *Id.* at 686. "[P]ublic acknowledgment of the [Nation's] religious heritage long officially recognized by the three constitutional branches of government," the Court concluded, render "farfetched" "[a]ny notion that these symbols pose a real danger of establishment of a state church." *Ibid.*

In *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989), the Court invalidated the display of a creche at a county courthouse, but sustained the inclusion of a menorah as part of a holiday display. In so holding, the Court reaffirmed *Lynch*'s approval of the reference to God in the Pledge, noting that

all of the Justices in *Lynch* viewed the Pledge as "consistent with the proposition that government may not communicate an endorsement of religious belief." *Id.* at 602-603 (citations omitted). The Court then used the Pledge and the general holiday display approved in *Lynch* as benchmarks for what the Establishment Clause permits, *ibid.* On that basis, the Court concluded that the display of the creche by itself was unconstitutional because, unlike the Pledge, it gave "praise to God in [sectarian] Christian terms." *Id.* at 598; see also *id.* at 603 (finding an "obvious distinction" between the Pledge and the display of the creche).

Furthermore, while not referring specifically to the Pledge of Allegiance, the Court, in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), upheld the historic practice of legislative prayer as "a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792. In so holding, the Court discussed numerous other examples of constitutionally permissible religious references in official life "that form 'part of the fabric of our society,'" *ibid.*, such as "God save the United States and this Honorable Court," which "occurs at all sessions of this Court," *id.* at 786. The Court also repeated its recognition that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Id.* at 792.

Likewise, in *Abington Township*, *supra*, the Court explained, in the course of invalidating laws requiring Bible-reading in public schools, that "our national life reflects a religious people," and noted the numerous permissible public references to God in historical documents and ceremonial practices, such as oaths ending with "So help me God." 374 U.S. at 213.

Finally, in *Engel* v. *Vitale*, 370 U.S. 421 (1962), in the course of invalidating official school prayers, the Court stressed:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise [official prayer] that the State of New York has sponsored in this instance.

Id. at 435 n.21.

In sum, this Court has repeatedly refused to "press the concept of separation of Church and State to * * * extremes" and to condemn as unconstitutional the "references to the Almighty that run through our laws, our public rituals, [and] our ceremonies." *Zorach*, 343 U.S. at 313.

b. The opinions of individual Justices have cemented as common ground the proposition that the Pledge of Allegiance, and similar acknowledgments of the Nation's religious heritage and character, are constitutionally permissible. See *Lee* v. *Weisman*, 505 U.S. 577, 633-635 (1992) (Scalia, J., dissenting, joined by Rehnquist, C.J., and White & Thomas, JJ.) (noting long historical practice, consistent with the Establishment Clause, of official references to God); *id.* at 638-639 (noting that the Court's invalidation of graduation prayer did not extend to the practice of also saying the Pledge of Allegiance at graduations); *County of Allegheny*, 492 U.S. at 623, 625 (O'Connor, J., concurring) ("government recognition and acknowledgment of the role of religion in the lives of our citizens" serve the "secular purposes of 'solemnizing public occasions, expressing confidence in the future

and encouraging the recognition of what is worthy of appreciation in society'"; in addition, because of their "history and ubiquity, such government acknowledgments of religion are not understood as conveying an endorsement of particular religious beliefs") (internal quotation marks omitted); *id.* at 657 (Stevens, J., concurring in part and dissenting in part, joined by Brennan & Marshall, JJ.) ("Government policies of * * * acknowledgment, and support for religion are an accepted part of our political and cultural heritage."); *id.* at 674 n.10 (Kennedy, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., and White & Scalia, JJ.) (explaining that the Court "will not proscribe" "the reference to God in the Pledge of Allegiance" and similar acknowledgments of religious culture); *Wallace* v. *Jaffree*, 472 U.S. 38, 78 n.5 (1985) (O'Connor, J., concurring) (same view as in *County of Allegheny*, with specific reference to the Pledge of Allegiance); *id.* at 88 (Burger, C.J., dissenting) (the argument that the Pledge of Allegiance, with its reference to God, violates the Establishment Clause "would of course make a mockery of our decisionmaking in Establishment Clause cases"); *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) (same view as in *County of Allegheny* with respect to "In God We Trust" and "God save the United States and this honorable court"); *Abington Township*, 374 U.S. at 304 (Brennan, J., concurring) ("The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact."); *id.* at 303 (The Pledge and similar acknowledgments of religion are "interwoven * * * so deeply into the fabric of our civil polity" that their "use may not present that type of involvement which the First Amendment prohibits."); *id.* at

307-308 (Goldberg, J., concurring, joined by Harlan, J.) ("[T]oday's decision does not mean that all incidents of government which import of the religious are therefore and without more banned by the strictures of the Establishment Clause," citing to divine references in the Declaration of Independence and the National Anthem); *Engel*, 370 U.S. at 449 (Stewart, J., dissenting) (citing as consistent with the Establishment Clause the then recently amended Pledge of Allegiance, the National Motto "In God We Trust," and the National Day of Prayer).

c. The court of appeals dismissed that overwhelming and consistent authority as "dicta" that was "not inconsistent" with its invalidation of the Pledge. App., *infra*, 15a. While the court of appeals is correct that none of those cases involved direct challenges to the Pledge, it fundamentally erred in disregarding this Court's consistent statements validating the Pledge. That is because, "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 67 (1996). The Court's analysis of the Pledge and similar official acknowledgments of religion in *Lynch* and *County of Allegheny* were not "mere *obiter dicta*" that the court of appeals was free to disregard. *Id.* at 66. They were components of the "well-established rationale upon which the Court based the results of its earlier decisions." *Id.* at 66-67. Those references articulated the constitutional baseline for permissible official acknowledgments of religion under the Establishment Clause against which the governmental practices at issue in each of those cases were then measured. Indeed, for decades, the Court and individual Justices "have grounded [their] decisions in the oft-repeated understanding," *id.* at 67,

that the Pledge of Allegiance, and similar references, are constitutional.[6]

The court of appeals' failure to recognize the analytical import of this Court's past decisions and statements underlies its erroneous conclusion that recitation of the Pledge of Allegiance in schools violates the Establishment Clause. First, in concluding that the Pledge results in unconstitutional coercion, the court of appeals failed to come to grips with this Court's repeated recognition that the Establishment Clause permits such historic, ubiquitous, and ceremonial acknowledgments of our Nation's religious character and heritage. See *Lynch*, 465 U.S. at 675, 677 (concluding that the words "under God" in the Pledge are an "acknowledgment of our religious heritage" similar to the "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers" that are "replete" in our nation's history). Such references are not reasonably and objectively understood as coercing individuals into silent assent to any particular religious doctrine. Rather, the Pledge is "consistent with the proposition that government may not communicate an endorsement of religious belief," *County of Allegheny*, 492 U.S. at 602-603, because the ceremonial reference to God acknowledges the undeniable historical facts that the Nation was founded by individuals who believed in God, that the Constitution's protection of individual rights and autonomy reflects those religious convictions, and that the Nation

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[6] See also *County of Allegheny*, 492 U.S. at 668 (Kennedy, J., concurring in part and dissenting in part) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law."); *Local 28 of the Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 478 U.S. 421, 490 (1986) (O'Connor, J., concurring) ("Although technically dicta, * * * an important part of the Court's rationale for the result [that] it reache[s] * * * is entitled to greater weight.").

continues as a matter of demographic and cultural fact to be a predominantly "religious people whose institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313.

Second, as Judge O'Scannlain explained in his dissent from the denial of rehearing en banc, App., *infra*, 69a-71a, 79a-83a, the court of appeals' decision proceeds from the faulty premise that the Pledge's acknowledgment of the Nation's religious heritage is the functional equivalent of prayer or a religious act like Bible reading. The decisions of this Court and individual Justices outlined above repeatedly admonish that not every reference to God amounts to impermissible government-endorsed religious exercise, and expressly refer to the Pledge and similar ceremonial references in contradistinction to formal religious exercises like prayer and Bible reading. See, *e.g.*, *Lynch*, *supra*; *Abington Township*, *supra*; *Engel*, *supra*. The Pledge is no more of a coercive religious exercise than the requirement at the opening of federal courts that individuals stand while a court official announces "God save the United States and this honorable Court."

Third, the court of appeals erred in analyzing the phrase "under God" in isolation. In the court's view, pledging allegiance to the phrase "under God" compelled an endorsement of monotheism in the same manner as phrases like "under Jesus," "under Vishnu," or "under Zeus." App., *infra*, 12a. But Congress did not enact a pledge consisting just of the words "under God," and the school district does not lead students in reciting only the phrase "under God." Nor did Congress enact a pledge to God. Individuals pledge allegiance to "the Flag of the United States of America," and "to the Republic for which it stands." 4 U.S.C. 4. The remainder of the Pledge then describes the culture and character of that Republic—a unified Country, composed of individual States yet indivisible as a Nation, founded for the purposes of promoting liberty and justice for all, *and*

founded by individuals who believed (and populated predominantly by people who continue to believe) that the Nation's character and destiny were rooted in the Divine.

In analyzing only Newdow's discomfiture with the phrase "under God," without considering its larger context, the court of appeals "plainly erred." *Lynch*, 465 U.S. at 680. In *Lynch*, this Court stressed that the Establishment Clause analysis looks at religious symbols and references in context, rather than "focusing almost exclusively on the" religious symbol alone. *Ibid.* The *Lynch* Court accordingly did not ask whether the government's display of a creche—a clearly religious symbol—was permissible. The Court analyzed whether the overall message conveyed by a display that included both that religious and other secular symbols of the Christmas holiday season conveyed a message of endorsement, and concluded that it did not. *Id.* at 680-686. The presence of the creche, the Court concluded, properly "depict[ed] the historical origins of this traditional event," *id.* at 680, and permissibly took "official note of Christmas, and of our religious heritage," *id.* at 686.

Likewise, in *County of Allegheny*, the Court analyzed and upheld the "combined display" during the winter holiday season of a Christmas tree, Liberty sign, and menorah. 492 U.S. at 616. The Court thus looked at the content of the display as a whole, rather than focusing on the presence of the menorah and the religious message that the menorah alone conveys. *Id.* at 616-620.

That Congress added the phrase "under God" to a preexisting Pledge does not change the analysis. The city government in *County of Allegheny* had likewise added the menorah, after the fact, to a preexisting holiday display. *Id.* at 581-582. Yet this Court trained its constitutional analysis on the display as a whole, rather than scrutinizing the message conveyed by each component as it was added seriatim. *Id.* at 616-620 & n.64; see also *Zelman* v. *Simmons-Harris*,

536 U.S. 639, 655-657 (2002) (noting that the Establishment Clause inquiry must consider all relevant programs, not just the specific program challenged); *id.* at 672-676 (O'Connor, J., concurring) (same); *Wallace*, 472 U.S. at 78 n.5 (O'Connor, J., concurring) (later addition of "under God" to Pledge does not violate the Establishment Clause because it "serve[s] as an acknowledgment of religion with the 'legitimate secular purpose of solemnizing public occasions, [and] expressing confidence in the future'").

The court of appeals attempted to distinguish the Pledge from other references to God in public life on the ground that the Pledge is "a performative statement," rather than simply "a reflection of [an] author's profession of faith." App., *infra*, 16a. As an initial matter, this Court's pronouncements have made no such distinction, consistently grouping the Pledge with the Motto, National Anthem, the Declaration of Independence, and similar public references, some of which frequently involve public performance (*e.g.*, the National Anthem) and some of which do not.

More importantly, the distinction makes no sense. With respect to "impressionable young schoolchildren," *id.* at 15a, there simply is no coherent or discernible "performative" difference between having them say the Pledge, rather than memorize and recite the National Motto ("In God *We Trust*"), 36 U.S.C. 302 (emphasis added), the Declaration of Independence, 1 U.S.C. at XLIII ("We hold these truths to be self-evident, that all men * * * are endowed by their Creator with certain unalienable Rights * * *."), or the Gettysburg Address ("[W]e here highly resolve * * * that this nation, under God, shall have a new birth of freedom."). Indeed, the court of appeals' approach leads to the curious conclusion that the recitation of Bible passages or long-established prayers in public schools, which would require students "merely to repeat the words of an historical document," App., *infra*, 16a, trenches less upon Establishment

Clause principles than the Pledge's two-word acknowledgment of the Nation's religious heritage. That conclusion cannot be reconciled with this Court's precedent or established analytical principles guiding Establishment Clause jurisprudence.

d. This Court's review is warranted because the Ninth Circuit's decision squarely conflicts with the Seventh Circuit's decision in *Sherman* v. *Community Consolidated School District 21*, *supra*, that the Pledge of Allegiance may constitutionally be recited in public elementary schools. Unlike the court of appeals here, the Seventh Circuit placed significant weight on this Court's repeated approval of the Pledge and similar official acknowledgments of religion, and concluded that the lower federal courts must "take [the Supreme Court's] assurances seriously." 980 F.2d at 448. Indeed, the Ninth Circuit acknowledged that its decision creates an inter-circuit conflict and that the courts' differing decisions were the product of different modes of analyzing Establishment Clause challenges to such official acknowledgments of religion. App., *infra*, 16a-17a. This Court's authoritative resolution of the question is therefore necessary.[7]

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[7] The Ninth Circuit's decision is also in considerable tension with court of appeals' decisions upholding analogous acknowledgments of the Nation's religious history and character. See *Gaylor* v. *United States*, 74 F.3d 214 (10th Cir.) (upholding against Establishment Clause challenge the National Motto, "In God We Trust," and its imprint on all currency), cert. denied, 517 U.S. 1211 (1996); *O'Hair* v. *Murray*, 588 F.2d 1144 (5th Cir.) (upholding National Motto), cert. denied, 442 U.S. 930 (1979); *Aronow* v. *United States*, 432 F.2d 242 (9th Cir. 1970) (same); *Ganulin* v. *United States*, 71 F. Supp. 2d 824 (S.D. Ohio 1999) (upholding constitutionality of 5 U.S.C. 6103, which makes Christmas Day a paid federal holiday), aff'd, 238 F.3d 420 (6th Cir. 2000), cert. denied, 532 U.S. 973 (2001); *Opinion of the Justices*, 228 A.2d 161 (N.H. 1967) (posting of plaques in all public school classrooms bearing the National Motto, "In God We Trust," would not violate the Establishment Clause).

e. The question presented is one of great importance. An Act of Congress has been held unconstitutional as applied in one of its most important contexts. See *Lynch*, 465 U.S. at 676; pp. 4-5, *supra*; App., *infra*, 14a & n.7. Furthermore, the impact of the decision below is potentially far-reaching. In addition to the practice at federally operated schools for military dependents, see n.2, *supra*, public schools within each of the 50 States lead students in voluntary recitations of the Pledge of Allegiance, see Idaho C.A. Amicus Curiae Br. 9-13 (citing state laws). It is untenable that a national Pledge of Allegiance to a national flag would have a different content depending on the judicial circuit in which it is uttered. Absent this Court's review, 9.6 million students in nine States (App., *infra*, 69a) will recite an abridged version of the Pledge, while the nearly 37 million students in the rest of the Country will recite the Pledge that Congress enacted. Students in the Ninth Circuit will also learn a different Pledge in school than they recite at other public and private events. The Pledge cannot serve its purpose of unifying and commonly celebrating the national identity unless it is one Pledge with one content for all citizens at all points in their lives. There is no reason to tolerate such disruption and disharmony in the schools of this Nation. The Pledge of Allegiance is constitutional. This Court has repeatedly said so, and federal and state schools have acted in reliance on those assurances. The Ninth Circuit's disregard of this Court's decisions and their underlying analytical principles merits review.

2. The issue of Newdow's standing to bring his constitutional challenge is a necessarily antecedent question that this Court would need to address were it to grant review. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Although it is the court of appeals' erroneous ruling on the merits that warrants this Court's review, the court of appeals also committed three errors in concluding that

Newdow's status as a noncustodial parent did not deprive him of standing to challenge an educational practice at his child's school.[8]

First, and most fundamentally, Newdow has not suffered the invasion of any legally protected interest. A number of this Court's Establishment Clause cases have involved lawsuits by parents challenging practices or policies in public schools. See, *e.g.*, *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Lee* v. *Weisman*, 505 U.S. 577 (1992); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). In all of those cases, however, the parents had the legal right to sue as next friend to vindicate their children's legal interests and to protect the parents' own constitutional rights to direct and control the religious and educational upbringing of their children, see *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535 (1925).

Newdow can assert neither right. He has no legal right to sue as his child's next friend, or otherwise seek to vindicate his child's legal interests, as the court of appeals recognized. App., *infra*, 96a. That prerogative rests exclusively with the mother, who has sole legal custody. *Ibid.* While Newdow retains the right to "consult" with the mother on educational decisions and to have "access" to the child's educational records, *id.* at 91a, Newdow does not allege that Elk Grove's

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[8] While the standing issue is necessarily antecedent to the merits of the Establishment Clause analysis, see *Steel Co.*, *supra*, this Petition presents the Establishment Clause issue first because the court of appeals' erroneous constitutional judgment clearly merits this Court's review. Whether or not the Ninth Circuit's erroneous standing analysis would independently merit an exercise of this Court' s certiorari jurisdiction, it does not pose a barrier to review in this case. The Ninth Circuit's standing analysis is closely intertwined with its flawed Establishment Clause ruling, and the decision below, which not only erroneously invalidates the Pledge of Allegiance, but did so at the behest of a party without Article III standing, should not be allowed to stand.

use of the Pledge in its schools interferes with either of those rights. Nor, contrary to the court of appeals' opinion, does Newdow have any right "to direct the religious education of his daughter." *Id.* at 7a. The custody order granted sole control over the child's "health, education and welfare" to the mother. *Id.* at 90a-91a. And the mother has made clear that she "wants her daughter to recite the Pledge as it stands as part of her education," Banning C.A. Mot. to Intervene 10.[9]

Where, as here, the two parents disagree on an educational practice, the decision of the custodial parent controls and Newdow has no right to overturn it. If, as the noncustodial parent, Newdow believes the mother's educational decisions are causing harm to the child, the proper remedy is for him to resort to family court and seek a modification of the custody agreement. He cannot use federal litigation to circumvent that state-law process or to modify a state-law custody judgment. See *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 482 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923).[10]

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[9] See also *Burge* v. *City & County of San Francisco*, 262 P.2d 6, 12 (Cal. 1953) (status as custodial parent "embrace[s] the sum of parental rights with respect to the rearing of a child, including its care. It includes the right * * * to direct his activities and make decisions regarding his care and control, education, health, and religion."); cf. *Michael H.* v. *Gerald D.*, 491 U.S. 110, 122-129 (1989).

[10] In apparent recognition of that limitation, the United States understands that Newdow has filed a motion in California Superior Court to alter the custody arrangement. That motion remains pending with a hearing date scheduled for July 31, 2003.

The court of appeals relied (App., *infra*, 92a-94a) on the Seventh Circuit's decision in *Navin* v. *Park Ridge School District*, 270 F.3d 1147 (2001) (per curiam), which held that a noncustodial father *might* be able to sue to enforce his son's rights under the Individuals with Disabilities Education Act, 20 U.S.C. 1415. In that case, however, the court concluded that the divorce decree did not strip the father of his parental interest in

Second, the court of appeals placed weight upon Newdow's residual right, under California law, to "expose" his child to his views. App., *infra*, 95a. But, again, Newdow has not alleged that Elk Grove or the United States has denied him any opportunity to expose his child to his particular viewpoints.

The court of appeals went further, however, and held that Newdow has a right not to have his message to his child interrupted or diluted by the government's educational practices. But, especially when that speech occurs with the consent of the custodial parent, the right of the non-custodial parent to "expose" the child to his views does not entitle that parent to close off all other views. Public schools routinely instruct students about evolution, war, and other matters with which some parents may disagree on religious, political, or moral grounds. What the Constitution protects, in those circumstances, is the parents' right to instill their own views in their children and to place them in a private school that is more consonant with their beliefs. See *Pierce*, *supra*.[11]

The court of appeals further erred in suggesting that Newdow's limited state-law right was somehow enhanced by that court's erroneous conclusion that his Establishment Clause challenge was meritorious. The court repeatedly

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ensuring the quality of his child's education. 270 F.3d at 1149. The court stressed, moreover, that the noncustodial parent could not use federal law "to upset choices committed to [the mother] by the state court," *id.* at 1150, which is exactly what Newdow's lawsuit attempts to do.

[11] Cf. *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 630 (1943) (holding only that children whose parents have religious objections to the content of the Pledge have a right not to participate in its recitation in a classroom, where their refusal "does not interfere with or deny rights of others to do so"); *Wooley* v. *Maynard*, 430 U.S. 705, 717 (1977) (the government "may legitimately" "communicate to others an official view as to proper appreciation of history, state pride, and individualism," as long as individuals are not forced to "becom[e] the courier for such message[s]").

couched Newdow's purported Article III injury in terms of a right not to have his daughter "subjected to *unconstitutional* state action" and "official state indoctrination of * * * an official view of religion." App., *infra*, 96a (emphasis added). See also *id.* at 97a (the mother "may not consent to *unconstitutional* government action in derogation of Newdow's rights") (emphasis added).

That approach, however, confuses the standing inquiry with the ultimate question on the merits. The type of injury that Article III requires must be discernible separate and apart from the ultimate resolution of the case. The plaintiff must identify some action by the opposing party that affects the plaintiff's particularized, individual rights concretely and imminently—regardless of whether that action ultimately is found to be lawful or not. "The requirement of standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982); see also *Schaffer* v. *Clinton*, 240 F.3d 878, 883 (10th Cir.) (denying standing where it "revolves around the asserted unconstitutionality of the [conduct as that] is a statement of [plaintiff's] view of the merits * * * and no more"), cert. denied, 534 U.S. 992 (2001).

Third, even if Newdow possesses some federal right not to have his message of atheism affected by his child's exposure to the Pledge, the court of appeals' limited invalidation of the Pledge in elementary schools does not redress that injury. Newdow's child remains subject to exposure to the Pledge in a wide variety of other assemblies and settings, public or private. In addition, the child's mother could place the child in private school where the official governmental Pledge could be recited daily. Unless the Establishment Clause compels courts to root out every reference to religion in public life, the relief ordered by the court here is incapable of

inoculating Newdow's message of atheism against any perceived dilution.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the court of appeals' judgment.

Respectfully submitted.

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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL A. NEWDOW, ET AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-16423
D.C. No. CV 00-00495-MLS/PAN

MICHAEL A. NEWDOW, PLAINTIFF-APPELLANT

v.

U.S. CONGRESS; UNITED STATES OF AMERICA; GEORGE W. BUSH,* PRESIDENT OF THE UNITED STATES; STATE OF CALIFORNIA; ELK GROVE UNIFIED SCHOOL DISTRICT; DAVID W. GORDON, SUPERINTENDENT EGUSD; SACRAMENTO CITY UNIFIED SCHOOL DISTRICT; JIM SWEENEY, SUPERINTENDENT SCUSD, DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Eastern District of California, Milton L. Schwartz, Senior Judge, Presiding

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Argued and Submitted: March 14, 2002
Filed: June 26, 2002
Amended: February 28, 2003

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* George W. Bush is substituted for his predecessor, William Jefferson Clinton, as President of the United States. Fed. R. App. P. 43(c)(2).

AMENDED OPINION AND
AMENDED CONCURRENCE/DISSENT

Before: ALFRED T. GOODWIN, STEPHEN REINHARDT and FERDINAND F. FERNANDEZ, Circuit Judges.

Opinion by Judge Goodwin; Partial Concurrence and Partial Dissent by Judge Fernandez

GOODWIN, Circuit Judge:

Michael Newdow appeals pro se a judgment dismissing his challenge to the constitutionality of the words "under God" in the Pledge of Allegiance to the Flag. Newdow argues that the addition of these words by a 1954 federal statute to the previous version of the Pledge of Allegiance (which made no reference to God) and the daily recitation in the classroom of the Pledge of Allegiance, with the added words included, by his daughter's public school teacher are violations of the Establishment Clause of the First Amendment to the United States Constitution.

FACTUAL AND PROCEDURAL BACKGROUND

Newdow is an atheist whose daughter attends public elementary school in the Elk Grove Unified School District ("EGUSD") in California. In accordance with state law and a school district rule, EGUSD teachers begin each school day by leading their students in a recitation of the Pledge of Allegiance ("the Pledge"). The California Education Code requires that public schools begin each school day with "appropriate patriotic exercises" and that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy" this requirement. Cal. Educ. Code § 52720

(1989) (hereinafter "California statute").[1] To implement the California statute, the school district that Newdow's daughter attends has promulgated a policy that states, in pertinent part: "Each elementary school class [shall] recite the pledge of allegiance to the flag once each day." The classmates of Newdow's daughter in the EGUSD are led by their teacher in reciting the Pledge codified in federal law. On June 22, 1942, Congress first codified the Pledge as "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Pub. L. No. 623, Ch. 435, § 7, 56 Stat. 380 (1942) (codified at 36 U.S.C. § 1972). On June 14, 1954, Congress amended Section 1972 to add the words "under God" after the word "Nation." Pub. L. No. 396, Ch. 297, 68 Stat. 249 (1954) ("1954 Act"). The Pledge is currently codified as "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all." 4 U.S.C. § 4 (1998) (Title 36 was revised and recodified by Pub. L. No. 105-225, § 2(a), 112 Stat. 1494 (1998). Section 172 was abolished, and the Pledge is now found in Title 4.)

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[1] The relevant portion of California Education Code § 52720 reads:

> In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.

Newdow does not allege that his daughter's teacher or school district requires his daughter to participate in reciting the Pledge.[2] Rather, he claims that his daughter is injured when she is compelled to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's [sic] is 'one nation under God.'" Newdow's complaint in the district court challenged the constitutionality, under the First Amendment, of the 1954 Act, the California statute, and the school district's policy requiring teachers to lead willing students in recitation of the Pledge. He sought declaratory and injunctive relief, but did not seek damages.

The school districts and their superintendents (collectively, "school district defendants") filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim. Magistrate Judge Peter A. Nowinski held a hearing at which the school district defendants requested that the court rule only on the constitutionality of the Pledge, and defer any ruling on sovereign immunity. The United States Congress, the United States, and the President of the United States (collectively, "the federal defendants") joined in the motion to dismiss filed by the school district defendants. The magistrate judge reported findings and a

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[2] Compelling students to recite the Pledge was held to be a First Amendment violation in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943) ("[T]he action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."). *Barnette* was decided before the 1954 Act added the words "under God" to the Pledge.

recommendation that the district court hold that the daily Pledge ceremony in the schools did not violate the Establishment Clause. District Judge Edward J. Schwartz approved the recommendation and entered a judgment of dismissal. This appeal followed.

DISCUSSION

A. Jurisdiction

Newdow asks the district court to order the President of the United States ("the President") to "alter, modify or repeal" the Pledge by removing the words "under God"; and to order the United States Congress ("Congress") "immediately to act to remove the words 'under God' from the Pledge." The President, however, is not an appropriate defendant in an action challenging the constitutionality of a federal statute. *See Franklin* v. *Massachusetts*, 505 U.S. 788, 802-03 (1992) (plurality) (observing that a court of the United States " 'has no jurisdiction of a bill to enjoin the President in the performance of his official duties' ") (quoting *Mississippi* v. *Johnson*, 71 U.S. 475 (1866)).

Similarly, in light of the Speech and Debate Clause of the Constitution, Art. I, § 6, cl. 1, the federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation. *See Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 503 (1975). Because the words that amended the Pledge were enacted into law by statute, the district court may not direct Congress to delete those words any more than it may order the President to take such action. All this, of course, is aside from the fact that the President has no authority to amend a statute or declare a law unconstitutional, those functions being reserved to Congress and the federal judiciary respectively.

Newdow nevertheless argues that because the 1954 Act violates the Establishment Clause, Congress should not be protected by the Speech and Debate Clause. This argument misses the jurisdictional, or separation of powers, point. As the Court held in *Eastland*, in determining whether or not the acts of members of Congress are protected by the Speech and Debate Clause, the court looks solely to whether or not the acts fall within the legitimate legislative sphere; if they do, Congress is protected by the absolute prohibition of the Clause against being "questioned in any other Place." *Id.* at 501. "If the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it." *Id.* at 508-09.

B. The State of California as a defendant

The State of California did not join in the motion to dismiss or otherwise participate in the district court proceedings. It did, however, *sub silentio*, receive the benefit of the district court's ruling dismissing the complaint. Accordingly, a reversal of the order would result in the reinstatement of the complaint against the state. With respect to the validity of the California statute, however, unlike in the case of the Congressional enactment and the school district policy, no arguments, legal or otherwise, were advanced by the parties in the district court. Thus, we do not address separately the validity of the California statute.

C. Standing

Article III standing is a jurisdictional issue. *See United States* v. *Viltrakis*, 108 F.3d 1159, 1160 (9th Cir. 1997). Accordingly, it "may be raised at any stage of

the proceedings, including for the first time on appeal." *See A-Z Intern.* v. *Phillips*, 179 F.3d 1187, 1190-91 (9th Cir. 1999). To satisfy standing requirements, a plaintiff must prove that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)).

Newdow has standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter. "Parents have a right to direct the religious upbringing of their children and, on that basis, have standing to protect their right." *Doe* v. *Madison Sch. Dist. No. 321*, 177 F.3d 789, 795 (9th Cir. 1999) (en banc); *see also Grove* v. *Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir. 1985) ("Appellants have standing to challenge alleged violations of the establishment clause of the First Amendment if they are directly affected by use of [the challenged book] in the English curriculum. [Appellant] has standing as a parent whose right to direct the religious training of her child is allegedly affected.") (citation omitted).

Newdow has standing to challenge the EGUSD's policy and practice regarding the recitation of the Pledge because his daughter is currently enrolled in elementary school in the EGUSD. However, Newdow has no standing to challenge the SCUSD's policy and practice because his daughter is not currently a student

there. The SCUSD and its superintendent have not caused Newdow or his daughter an "injury in fact" that is "actual or imminent, not conjectural or hypothetical." *Laidlaw*, 528 U.S. at 180 (citing *Lujan*, 504 U.S. at 560-561).

D. Establishment Clause

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion," U.S. Const. Amend. I, a provision that "the Fourteenth Amendment makes applicable with full force to the States and their school districts." *Lee* v. *Weisman*, 505 U.S. 577, 580 (1992). Over the last three decades, the Supreme Court has used three interrelated tests to analyze alleged violations of the Establishment Clause in the realm of public education: the three-prong test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971); the "endorsement" test, first articulated by Justice O'Connor in her concurring opinion in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), and later adopted by a majority of the Court in *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989); and the "coercion" test first used by the Court in *Lee*.

In 1971, in the context of unconstitutional state aid to nonpublic schools, the Supreme Court in *Lemon* set forth the following test for evaluating alleged Establishment Clause violations. To survive the "*Lemon* test," the government conduct in question (1) must have a secular purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13. The Supreme Court applied the *Lemon* test to

every Establishment case it decided between 1971 and 1984, with the exception of *Marsh* v. *Chambers*, 463 U.S. 783 (1983), the case upholding legislative prayer.[3] *See Wallace*, 472 U.S. at 63 (Powell, J., concurring).

In the 1984 *Lynch* case, which upheld the inclusion of a nativity scene in a city's Christmas display, Justice O'Connor wrote a concurring opinion in order to suggest a "clarification" of Establishment Clause jurisprudence. 465 U.S. at 687 (O'Connor, J., concurring).

Justice O'Connor's "endorsement" test effectively collapsed the first two prongs of the *Lemon* test:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions . . . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Id. at 687-88 (O'Connor, J., concurring).

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[3] In *Marsh*, the Court "held that the Nebraska Legislature's practice of opening each day's session with a prayer by a chaplain paid by the State did not violate the Establishment Clause of the First Amendment. [The] holding was based upon the historical acceptance of the practice that had become 'part of the fabric of our society.'" *Wallace*, 472 U.S. at 63 n. 4 (Powell, J., concurring) (quoting *Marsh*, 463 U.S. at 792).

The Court formulated the "coercion test" when it held unconstitutional the practice of including invocations and benedictions in the form of "nonsectarian" prayers at public school graduation ceremonies. *Lee*, 505 U.S. at 599. Declining to reconsider the validity of the *Lemon* test, the Court in *Lee* found it unnecessary to apply the *Lemon* test to find the challenged practices unconstitutional. *Id.* at 587. Rather, it relied on the principle that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so." *Id.* (citations and internal quotation marks omitted). The Court first examined the degree of school involvement in the prayer, and found that "the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position." *Id.* at 590. The next issue the Court considered was "the position of the students, both those who desired the prayer and she who did not." *Id.* Noting that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," *id.* at 592, the Court held that the school district's supervision and control of the graduation ceremony put impermissible pressure on students to participate in, or at least show respect during, the prayer, *id.* at 593. The Court concluded that primary and secondary school children may not be placed in the dilemma of either participating in a religious ceremony or protesting. *Id.* at 594.

Finally, in its most recent school prayer case, the Supreme Court applied the *Lemon* test, the endorsement test, and the coercion test to strike down a school

district's policy of permitting student-led "invocations" before high school football games. *See Santa Fe*, 530 U.S. at 310-16. Citing *Lee*, the Court held that "the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship." *Id.* at 312. Applying the *Lemon* test, the Court found that the school district policy was facially unconstitutional because it did not have a secular purpose. *Id.* at 314-16. The Court also used language associated with the endorsement test. *Id.* at 315 ("[T]his policy was implemented with the purpose of endorsing school prayer."); *id.* at 317 ("Government efforts to endorse religion cannot evade constitutional reproach based solely on the remote possibility that those attempts may fail.").

We are free to apply any or all of the three tests, and to invalidate any measure that fails any one of them. Because we conclude that the school district policy impermissibly coerces a religious act and accordingly hold the policy unconstitutional, we need not consider whether the policy fails the endorsement test or the *Lemon* test as well.

In the context of the Pledge, the statement that the United States is a nation "under God" is a profession of a religious belief, namely, a belief in monotheism. The recitation that ours is a nation "under God" is not a mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic. Rather, the phrase "one nation under God" in the context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since

1954—monotheism. A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," or a nation "under no god," because none of these professions can be neutral with respect to religion. The school district's practice of teacher-led recitation of the Pledge aims to inculcate in students a respect for the ideals set forth in the Pledge, including the religious values it incorporates.

The Supreme Court recognized the normative and ideological nature of the Pledge in *Barnette*, 319 U.S. 624. There, the Court held unconstitutional a school district's wartime policy of punishing students who refused to recite the Pledge and salute the flag. *Id.* at 642. The Court noted that the school district was compelling the students "to declare a belief," *id.* at 631, and "requir[ing] the individual to communicate by word and sign his acceptance of the political ideas [the flag] . . . bespeaks," *id.* at 633. "[T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind." *Id.* The Court emphasized that the political concepts articulated in the Pledge[4] were idealistic, not descriptive: "'[L]iberty and justice for all,' if it must be accepted as descriptive of the present order rather than an ideal, might to some seem an overstatement." *Id.* at 634 n.14. The Court concluded that: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force

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[4] *Barnette* was decided before "under God" was added, and thus the Court's discussion was limited to the political ideals contained in the Pledge.

citizens to confess by word or act their faith therein." *Id.* at 642.

The school district's policy here, like the school's action in *Lee*, places students in the untenable position of choosing between participating in an exercise with religious content or protesting. The defendants argue that the religious content of "one nation under God" is minimal. To an atheist or a believer in non-Judeo-Christian religions or philosophies, however, this phrase may reasonably appear to be an attempt to enforce a "religious orthodoxy" of monotheism, and is therefore impermissible. As the Court observed with respect to the graduation prayer in *Lee*: "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Lee*, 505 U.S. at 592.

The coercive effect of the policy here is particularly pronounced in the school setting given the age and impressionability of schoolchildren, and their understanding that they are required to adhere to the norms set by their school, their teacher and their fellow students.[5] Furthermore, under *Lee*, non-compulsory participation is no basis for distinguishing Barnette [*sic*] from the case at bar because, even without a

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[5] The "subtle and indirect" social pressure which permeates the classroom also renders more acute the message sent to non-believing school-children that they are outsiders. *See Lee*, 505 U.S. at 592-93 (stating that "the risk of indirect coercion" from prayer exercises is particularly "pronounced" in elementary and secondary public school because students are subjected to peer pressure and public pressure which is "as real as any overt compulsion").

recitation requirement for each child, the mere presence in the classroom every day as peers recite the statement "one nation under God" has a coercive effect.[6] The coercive effect of the Pledge is also made even more apparent when we consider the legislative history of the Act that introduced the phrase "under God." These words were designed to be recited daily in school classrooms. President Eisenhower, during the Act's signing ceremony, stated: "From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty." 100 Cong. Rec. 8618 (1954) (statement of Sen. Ferguson incorporating signing statement of President Eisenhower).[7] All in all, there can be little doubt that under the controlling Supreme

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[6] The objection to the Pledge in *Barnette*, like in the case at bar, was based upon a religious ground. The Pledge in the classroom context imposes upon schoolchildren the constitutionally unacceptable choice between participating and protesting. Recognizing the severity of the effect of this form of coercion on children, the Supreme Court in *Lee* stated, "the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position." 505 U.S. at 593.

[7] In addition, the legislative history of the 1954 Act makes it plain that the sponsors of the amendment knew about and capitalized on the state laws and school district rules that mandate recitation of the Pledge. The legislation's House sponsor, Representative Louis C. Rabaut, testified at the Congressional hearing that "the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins." This statement was incorporated into the report of the House Judiciary Committee. H.R. Rep. No. 83-1693, at 3 (1954), *reprinted in* 1954 U.S.C.C.A.N 2339, 2341.

Court cases the school district's policy fails the coercion test.[8]

The Supreme Court has addressed the Pledge in passing, and we owe due deference to its dicta. *See United States* v. *Baird*, 85 F.3d 450, 453 (9th Cir. 1996). Our opinion, however, is not inconsistent with this dicta. In *Allegheny*, the Court noted that it had "considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." 492 U.S. at 602-03. And in *Lynch*, the Court observed that students recited the pledge daily, but only to support its point that there is a long tradition of "official acknowledgment" of religion. 465 U.S. at 674, 676. Neither of these two references speaks to the issue here. We may assume *arguendo* that public officials do not unconstitutionally endorse religion when they recite the Pledge, yet it does not follow that schools may coerce impressionable young schoolchildren to recite it, or even to stand mute while it is being recited by their classmates.

Our decision is not inconsistent with *Engel*, which approved of encouraging students to "recit[e] historical documents such as the Declaration of Independence

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[8] In *Aronow* v. *United States*, 432 F.2d 242 (9th Cir. 1970), this court, without reaching the question of standing, upheld the inscription of the phrase "In God We Trust" on our coins and currency. *But cf. Wooley* v. *Maynard*, 430 U.S. 705, 722 (1977) (Rehnquist, J., dissenting) (stating that the majority's holding leads logically to the conclusion that "In God We Trust" is an unconstitutional affirmation of belief). In any event, *Aronow* is distinguishable in many ways from the present case. The most important distinction is that school children are not coerced into reciting or otherwise actively led to participating in an endorsement of the markings on the money in circulation.

which contain references to the Deity or . . . sing[ ] officially espoused anthems which include the composer's professions of faith in a Supreme Being." 370 U.S. at 435 n.21. The Pledge differs from the Declaration and the anthem in that its reference to God, in textual and historical context, is not merely a reflection of the author's profession of faith. It is, by design, an affirmation by the person reciting it. "I pledge" is a performative statement. *See* J.L. Austin, *How to Do Things with Words* (J.O. Urmsson & Marina Sbisa eds., Harvard Univ. Press 1975) (1962). To pledge allegiance to something is to alter one's moral relationship to it, and not merely to repeat the words of an historical document or anthem.

The only other United States Court of Appeals to consider the issue is the Seventh Circuit, which held in *Sherman* v. *Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992), that a policy similar to the one before us regarding the recitation of the Pledge of Allegiance containing the words "one nation under God" was constitutional. The *Sherman* court first stated that:

> If as *Barnette* holds no state may require anyone to recite the Pledge, and if as the prayer cases hold the recitation by a teacher or rabbi of unwelcome words is coercion, then the Pledge of Allegiance becomes unconstitutional under all circumstances, just as no school may read from a holy scripture at the start of class.

980 F.2d at 444. It then concludes, however, that this reasoning is flawed because the First Amendment "[does] not establish general rules about speech or schools; [it] call[s] for religion to be treated differently."

Id. We have some difficulty understanding this statement; we do not believe that the Constitution prohibits compulsory patriotism as in *Barnette*, but permits compulsory religion as in this case. If government-endorsed religion is to be treated differently from government-endorsed patriotism, the treatment must be less favorable, not more.

The Seventh Circuit makes an even more serious error, however. It not only refuses to apply the *Lemon* test because of the Supreme Court's criticism of that test in *Lee*, but it also fails to apply the coercion test from *Lee*. Circuit courts are not free to ignore Supreme Court precedent in this manner. *Rodriguez de Quijas* v. *Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Instead of applying any of the tests announced by the Supreme Court, the Seventh Circuit simply frames the question as follows: "Must ceremonial references in civic life to a deity be understood as prayer, or support for all monotheistic religions, to the exclusion of atheists and those who worship multiple gods?" 980 F.2d at 445. For the reasons we have already explained, this question is simply not dispositive of whether the school district policy impermissibly coerces a religious act.

In light of Supreme Court precedent, we hold that the school district's policy and practice of teacher-led recitation of the Pledge, with the inclusion of the added words "under God," violates the Establishment Clause.

In addition to the relief that Newdow seeks against the school district—relief to which he is entitled—Newdow seeks a declaration as to the constitutionality of the 1954 Act. The district court did not discuss that question because it dismissed Newdow's complaint on the basis of its holding that the school district's policy did not violate the First Amendment. Given our contrary holding, we must consider whether to grant Newdow's claim for declaratory relief as to the Act. Normally, whether to decide a claim for declaratory judgment is left to the discretion of the district court. 28 U.S.C. § 2201(a); *see also Government Employees Ins. Co.* v. *Dizol*, 133 F.3d 1220, 1222-23 (9th Cir. 1998). We doubt that, given the relief to which we decide Newdow is entitled, the district court would have exercised its discretionary power to resolve, in the present case, the additional issue as to which Newdow seeks declaratory relief. Accordingly, we decline to reach that issue here.

The judgment of dismissal is vacated with respect to Newdow's claim that the school district's Pledge policy violates the Establishment Clause and the cause is remanded for further proceedings consistent with our holding. Plaintiff is to recover costs on this appeal.

REVERSED and REMANDED.

FERNANDEZ, Circuit Judge, concurring and dissenting:

I concur in parts A, B and C of the majority opinion, but dissent as to part D.

We are asked to hold that inclusion of the phrase "under God" in this nation's Pledge of Allegiance violates the religion clauses of the Constitution of the United States. We should do no such thing. We should, instead, recognize that those clauses were not designed to drive religious expression out of public thought; they were written to avoid discrimination.[1]

We can run through some or all of the tests and concepts which have floated to the surface from time to time. Were we to do so, the one that appeals most to me, the one I think to be correct, is the concept that what the religion clauses of the First Amendment require is neutrality; that those clauses are, in effect, an early kind of equal protection provision and assure that government will neither discriminate for nor discriminate against a religion or religions. *See Gentala* v. *City of Tucson*, 244 F.3d 1065, 1083-86 (9th Cir.) (en banc) (Fernandez, J., dissenting), *cert. granted and judgment vacated by* 534, U.S. 946, 122 S. Ct. 340, 151 L. Ed. 2d 256 (2001); *Goehring* v. *Brophy*, 94 F.3d 1294, 1306-07 (9th Cir. 1996) (Fernandez, J., concurring). But, legal world abstractions and ruminations aside, when all is said and done, the danger that "under God" in our

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[1] Although the majority now formally limits itself to holding that it is unconstitutional to recite the Pledge in public classrooms, its message that something is constitutionally infirm about the Pledge itself abides and remains a clear and present danger to all similar public expressions of reverence. At the very least, it deprives children in public schools of the benefits derived from those expressions.

Pledge of Allegiance will tend to bring about a theocracy or suppress somebody's beliefs is so minuscule as to be de minimis. The danger that phrase presents to our First Amendment freedoms is picayune at most.

Judges, including Supreme Court Justices, have recognized the lack of danger in that and similar expressions for decades, if not for centuries, as have presidents[2] and members of our Congress. *See, e.g.*, *County of Allegheny* v. *ACLU*, 492 U.S. 573, 602-03, 672-73, 109 S. Ct. 3086, 3106, 3143, 106 L. Ed. 2d 472 (1989); *Wallace* v. *Jaffree*, 472 U.S. 38, 78 n.5, 105 S. Ct. 2479, 2501 n.5, 86 L. Ed. 2d 29 (1985); *Lynch* v. *Donnelly*, 465 U.S. 668, 676, 693, 716, 104 S. Ct. 1355, 1361, 1369, 1382, 79 L. Ed. 2d 604 (1984); *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203, 306-08, 83 S. Ct. 1560, 1615-16, 10 L. Ed. 2d 844 (1963);[3] *Separation of Church & State Comm.* v. *City of Eugene*, 93 F.3d 617, 622 (9th Cir. 1996) (O'Scannlain, J., concurring); *Gaylor* v. *United States*, 74 F.3d 214, 217-18 (10th Cir. 1996); *Sherman* v. *Cmty Consol. Sch. Dist. 21*, 980 F.2d 437, 445-48 (7th Cir. 1992); *O'Hair* v. *Murray*, 588 F.2d 1144, 1144 (5th Cir. 1978) (per curiam); *Aronow* v. *United States*, 432 F.2d 242, 243-44 (9th Cir. 1970); *cf. Marsh* v.

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[2] *See, e.g., Lee* v. *Weisman*, 505 U.S. 577, 632-35, 112 S. Ct. 2649, 2679-80, 120 L. Ed. 2d 467 (1992) (Scalia, J., dissenting).

[3] The citations to the four preceding Supreme Court opinions are to majority opinions, concurring opinions, and dissents. Because my point is that a number of Justices have recognized the lack of danger and because I hope to avoid untoward complication in the setting out of the citations, I have not designated which Justices have joined in which opinion. All in all, however, perusing those opinions indicates that Chief Justice Burger, Chief Justice Rehnquist, and Justices Harlan, Brennan, White, Goldberg, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia, and Kennedy have so recognized.

Chambers, 463 U.S. 783, 795, 103 S. Ct. 3330, 3338, 77 L. Ed. 2d 1019 (1983) (legislative prayer). I think it is worth stating a little more about two of the cases which I have just cited. In *County of Allegheny*, 492 U.S. at 602-03, 109 S. Ct. at 3106, the Supreme Court had this to say: "Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." The Seventh Circuit, reacting in part to that statement, has wisely expressed the following thought:

> Plaintiffs observe that the Court sometimes changes its tune when it confronts a subject directly. True enough, but an inferior court had best respect what the majority says rather than read between the lines. If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so.

Sherman, 980 F.2d at 448.

Some, who rather choke on the notion of de minimis, have resorted to the euphemism "ceremonial deism." *See, e.g., Lynch*, 465 U.S. at 716, 104 S. Ct. at 1382 (Brennan, J., dissenting). But whatever it is called (I care not), it comes to this: such phrases as "In God We Trust," or "under God" have no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity. Those expressions have not caused any real harm of that sort over the years since 1791, and are not likely to

do so in the future.[4] As I see it, that is not because they are drained of meaning.[5] Rather, as I have already indicated, it is because their tendency to establish religion (or affect its exercise) is exiguous. I recognize that some people may not feel good about hearing the phrases recited in their presence, but, then, others might not feel good if they are omitted. At any rate, the Constitution is a practical and balanced charter for the just governance of a free people in a vast territory. Thus, although we do feel good when we contemplate the effects of its inspiring phrasing and majestic promises, it is not primarily a feel-good prescription.[6] In *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 630, 642, 63 S. Ct. 1178, 1181, 1187, 87 L. Ed. 1628 (1943), for example, the Supreme Court did not say that the Pledge could not be recited in the presence of Jehovah's Witness children; it merely said that they did not have to recite it.[7] That fully protected their con-

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[4] They have not led us down the long path to kulturkampf or worse. Those who are somehow beset by residual doubts and fears should find comfort in the reflection that no baleful religious effects have been generated by the existence of similar references to a deity throughout our history. More specifically, it is difficult to detect any signs of incipient theocracy springing up since the Pledge was amended in 1954.

[5] *See also Sherman*, 980 F.2d at 448 (Manion, J., concurring) ("A civic reference to God does not become permissible . . . only when . . . it is sapped of religious significance." The Pledge is constitutional and "[w]e need not drain the meaning from the reference [to God] to reach this conclusion."

[6] We, by the way, indicated as much in *American Family Ass'n, Inc.* v. *City and County of San Francisco*, 277 F.3d 1114, 1125-26 (9th Cir. 2002), which involved governmental conduct that was much more questionable than adoption of the phrase "under God." *See id.* at 1126-28 (Noonan, J., dissenting).

[7] I recognize that the Pledge did not then contain the phrase "under God."

stitutional rights by precluding the government from trenching upon "the sphere of intellect and spirit." *Id.* at 642, 63 S. Ct. at 1187. As the Court pointed out, their religiously based refusal "to participate in the ceremony [would] not interfere with or deny rights of others to do so." *Id.* at 630, 63 S. Ct. at 1181. We should not permit Newdow's feel-good concept to change that balance.

My reading of the stelliscript suggests that upon Newdow's theory of our Constitution, accepted by my colleagues today, we will soon find ourselves prohibited from using our album of patriotic songs in many public settings. "God Bless America" and "America The Beautiful" will be gone for sure, and while use of the first three stanzas of "The Star Spangled Banner" will still be permissible, we will be precluded from straying into the fourth.[8] And currency beware! Judges can accept those results if they limit themselves to elements and tests, while failing to look at the good sense and principles that animated those tests in the first place. But they do so at the price of removing a vestige of the awe all of us, including our children, must feel at the immenseness of the universe and our own small place within it, as well as the wonder we must feel at the good fortune of our country. That will cool the febrile nerves of a few at the cost of removing the healthy glow conferred upon many citizens when the forbidden verses, or phrases, are uttered, read, or seen.

In short, I cannot accept the eliding of the simple phrase "under God" from our Pledge of Allegiance in any setting, when it is obvious that its tendency to

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[8] Nor will we be able to stray into the fourth stanza of "My Country 'Tis of Thee" for that matter.

establish religion in this country or to interfere with the free exercise (or non-exercise) of religion is de minimis.[9]

Thus, I respectfully concur in part and dissent in part.

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[9] Lest I be misunderstood, I must emphasize that to decide this case it is not necessary to say, and I do not say, that there is such a thing as a de minimis constitutional violation. What I do say is that the de minimis tendency of the Pledge to establish a religion or to interfere with its free exercise is no constitutional violation at all. By the way, I am not the first to apply the de minimis concept to this area of the law. *See, e.g., Mitchell* v. *Helms*, 530 U.S. 793, 861, 120 S. Ct. 2530, 2569, 147 L. Ed. 2d 660 (2000) (O'Connor, J., concurring) (evidence of improper use of funds was de minimis and did not affect constitutional inquiry); *Lee* v. *Weisman*, 505 U.S. 577, 630-31, 112 S. Ct. 2649, 2678, 120 L. Ed. 2d 467 (1992) (Souter, J. concurring) (establishment case; Madison recognized there is a difference between trivial and serious in constitutional practice, and pointed to the legal aphorism de minimis); *Lynch* v. *Donnelly*, 465 U.S. 668, 678, 104 S. Ct. 1355, 1361-62, 79 L. Ed. 2d 604 (1984) (not all government conduct which gives special recognition to religion is unconstitutional; where the benefit is indirect or remote, it is not unconstitutional); *School District of Abington* v. *Schempp*, 374 U.S. 203, 308, 83 S. Ct. 1560, 1616, 10 L. Ed. 2d 844 (1963) (Goldburg, J., concurring) ("the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow."); *Rapier* v. *Harris*, 172 F.3d 999, 1006 n.4 (7th Cir. 1999) ("De minimis burdens on free exercise are not of constitutional dimension); *Van Zandt* v. *Thompson*, 839 F.2d 1215, 1222 (7th Cir. 1988) (legislative prayer room would have a de minimis effect on advancement of religion); *Walsh* v. *La. High Sch. Athletic Ass'n*, 616 F.2d 152, 158 (5th Cir. 1980) (de minimis burden on free exercise results in rejection of First Amendment challenge); *Marsa* v. *Wernik*, 430 A.2d 888, 899 (N.J. 1981) (in an establishment case where impact of practice de minimis, it is unobjectionable); *see also Peck* v. *Upshur County Bd. of Educ.*, 155 F.3d 274, 288-89 (4th Cir. 1998) (if a genuine threat of establishing religion becomes apparent, it is soon enough to address the issue).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-16423
D.C. No. CV 00-00495-MLS/PAN

MICHAEL A. NEWDOW, PLAINTIFF-APPELLANT

v.

U.S. CONGRESS; UNITED STATES OF AMERICA; WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES; STATE OF CALIFORNIA; ELK GROVE UNIFIED SCHOOL DISTRICT; DAVID W. GORDON, SUPERINTENDENT EGUSD; SACRAMENTO CITY UNIFIED SCHOOL DISTRICT; JIM SWEENEY, SUPERINTENDENT SCUSD, DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Eastern District of California, Milton J. Schwartz, Senior Judge, Presiding

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Argued and Submitted: March 14, 2002
Filed: June 26, 2002

Before: GOODWIN, REINHARDT and FERNANDEZ, Circuit Judges.

Partial Concurrence and Partial Dissent by Judge FERNANDEZ.

OPINION

GOODWIN, Circuit Judge:

Michael Newdow appeals a judgment dismissing his challenge to the constitutionality of the words "under God" in the Pledge of Allegiance to the Flag. Newdow argues that the addition of these words by a 1954 federal statute to the previous version of the Pledge of Allegiance (which made no reference to God) and the daily recitation in the classroom of the Pledge of Allegiance, with the added words included, by his daughter's public school teacher are violations of the Establishment Clause of the First Amendment to the United States Constitution.

FACTUAL AND PROCEDURAL BACKGROUND

Newdow is an atheist whose daughter attends public elementary school in the Elk Grove Unified School District ("EGUSD") in California. In accordance with state law and a school district rule, EGUSD teachers begin each school day by leading their students in a recitation of the Pledge of Allegiance ("the Pledge"). The California Education Code requires that public schools begin each school day with "appropriate patriotic exercises" and that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy" this requirement. Cal. Educ. Code § 52720

(1989) (hereinafter "California statute").[1] To implement the California statute, the school district that Newdow's daughter attends has promulgated a policy that states, in pertinent part: "Each elementary school class [shall] recite the pledge of allegiance to the flag once each day."[2]

The classmates of Newdow's daughter in the EGUSD are led by their teacher in reciting the Pledge codified in federal law. On June 22, 1942, Congress first codified the Pledge as "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Pub. L. No. 623, Ch. 435, § 7, 56 Stat. 380 (1942) (codified at 36 U.S.C. § 1972). On June 14, 1954, Congress amended Section 1972 to add the words "under God" after the word "Nation." Pub. L. No. 396, Ch. 297, 68 Stat. 249 (1954) ("1954 Act"). The Pledge is currently codified as "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with

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[1] The relevant portion of California Education Code § 52720 reads:

> In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.

[2] The SCUSD, the school district that Newdow claims his daughter may in the future attend, has promulgated a similar rule: "Each school shall conduct patriotic exercises daily. . . . The Pledge of Allegiance to the flag will fulfill this requirement." However, as discussed *infra*, Newdow lacks standing to challenge the SCUSD's rule requiring recitation of the Pledge.

liberty and justice for all." 4 U.S.C. § 4 (1998) (Title 36 was revised and recodified by Pub. L. No. 105-225, § 2(a), 112 Stat. 1494 (1998). Section 172 was abolished, and the Pledge is now found in Title 4.)

Newdow does not allege that his daughter's teacher or school district requires his daughter to participate in reciting the Pledge.[3] Rather, he claims that his daughter is injured when she is compelled to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's [sic] is 'one nation under God.'"

Newdow's complaint in the district court challenged the constitutionality, under the First Amendment, of the 1954 Act, the California statute, and the school district's policy requiring teachers to lead willing students in recitation of the Pledge. He sought declaratory and injunctive relief, but did not seek damages.

The school districts and their superintendents (collectively, "school district defendants") filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim. Magistrate Judge Peter A. Nowinski held a hearing at which the school district defendants requested that the court rule only on the constitutionality of the Pledge, and defer any ruling on sover-

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[3] Compelling students to recite the Pledge was held to be a First Amendment violation in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) ("[T]he action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."). *Barnette* was decided before the 1954 Act added the words "under God" to the Pledge.

eign immunity. The United States Congress, the United States, and the President of the United States (collectively, "the federal defendants") joined in the motion to dismiss filed by the school district defendants. The magistrate judge reported findings and a recommendation; District Judge Edward J. Schwartz approved the recommendation and entered a judgment of dismissal. This appeal followed.

DISCUSSION

A. Jurisdiction

Newdow asks the district court to order the President of the United States ("the President") to "alter, modify or repeal" the Pledge by removing the words "under God"; and to order the United States Congress ("Congress") "immediately to act to remove the words 'under God' from the Pledge." The President, however, is not an appropriate defendant in an action challenging the constitutionality of a federal statute. *See Franklin v. Massachusetts*, 505 U.S. 788, 802-03, 112 S. Ct. 2767, 120 L.Ed.2d 636 (1992) (plurality) (observing that a court of the United States " 'has no jurisdiction of a bill to enjoin the President in the performance of his official duties' ") (quoting *Mississippi v. Johnson*, 71 U.S. 475, 501, 18 L.Ed. 437 (1866)).

Similarly, in light of the Speech and Debate Clause of the Constitution, Art. I, § 6, cl. 1, the federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation. *See Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503, 95 S. Ct. 1813, 44 L.Ed.2d 324 (1975). Because the words that amended the Pledge were enacted into law by statute, the district court may not direct Congress to delete those words any more than it may order the President to take

such action. All this, of course, is aside from the fact that the President has no authority to amend a statute or declare a law unconstitutional, those functions being reserved to Congress and the federal judiciary respectively.

Newdow nevertheless argues that because the 1954 Act violates the Establishment Clause, Congress should not be protected by the Speech and Debate Clause. This argument misses the jurisdictional, or separation of powers, point. As the Court held in *Eastland*, in determining whether or not the acts of members of Congress are protected by the Speech and Debate Clause, the court looks solely to whether or not the acts fall within the legitimate legislative sphere; if they do, Congress is protected by the absolute prohibition of the Clause against being "questioned in any other Place." *Id.* at 501. "If the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it." *Id.* at 508-09, 95 S. Ct. 1813. Although the district court lacks jurisdiction over the President and the Congress, the question of the constitutionality of the 1954 Act remains before us. While the court correctly dismissed the claim against those parties, it survives against others.

B. The State of California as a defendant

The State of California did not join in the motion to dismiss or otherwise participate in the district court proceedings. It did, however, *sub silentio*, receive the benefit of the district court's ruling dismissing the complaint. Accordingly, a reversal of the order would result in the reinstatement of the complaint against the state. With respect to the validity of the California

statute, however, unlike in the case of the Congressional enactment and the school district policy, no arguments, legal or otherwise, were advanced by the parties either below or here. Thus, we do not address separately the validity of the California statute.

C. Standing

Article III standing is a jurisdictional issue. *See United States v. Viltrakis*, 108 F.3d 1159, 1160 (9th Cir. 1997). Accordingly, it "may be raised at any stage of the proceedings, including for the first time on appeal." *See A-Z Intern. v. Phillips*, 179 F.3d 1187, 1190-91 (9th Cir. 1999). To satisfy standing requirements, a plaintiff must prove that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L.Ed.2d 610 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992)).

Newdow has standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter. "Parents have a right to direct the religious upbringing of their children and, on that basis, have standing to protect their right." *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 795 (9th Cir. 1999) (en banc); *see also Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir. 1985) ("Appellants have standing to challenge alleged violations of the establishment clause of the First Amendment if they are directly affected by use of [the challenged book] in

the English curriculum. [Appellant] has standing as a parent whose right to direct the religious training of her child is allegedly affected.") (citation omitted).

Newdow has standing to challenge the EGUSD's policy and practice regarding the recitation of the Pledge because his daughter is currently enrolled in elementary school in the EGUSD. However, Newdow has no standing to challenge the SCUSD's policy and practice because his daughter is not currently a student there. The SCUSD and its superintendent have not caused Newdow or his daughter an "injury in fact" that is "actual or imminent, not conjectural or hypothetical." *Laidlaw*, 528 U.S. at 180, 120 S. Ct. 693 (citing *Lujan*, 504 U.S. at 560- 561, 112 S. Ct. 2130).

The final question of standing relates to the 1954 Act. Specifically, has Newdow suffered an "injury in fact" that is "fairly traceable" to the enactment of the 1954 Act? *Id.*

We begin our inquiry by noting the general rule that the standing requirements for an action brought under the Establishment Clause are the same as for any other action. *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 488-90, 102 S. Ct. 752, 70 L.Ed.2d 700 (1982). "The requirement of standing focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. Moreover, we know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing which might permit respondents to invoke the judicial power of the United States." *Id.* at 484, 102 S. Ct. 752 (citation and internal quotation marks omitted). In *Valley Forge*, an organization dedicated to the separation of church and state

brought suit challenging the federal government's grant of surplus federal property to a church-related college. The suit alleged that this grant of real property, without any financial payment by the college, was a violation of the Establishment Clause. The Supreme Court found that the plaintiff had standing neither as a taxpayer, *see id.* at 479-80, 102 S. Ct. 752, nor as a party personally injured as a consequence of the alleged unconstitutional action, *see id.* at 484-86, 102 S. Ct. 752. The "psychological consequence presumably produced by observation of conduct with which one disagrees . . . . is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Id.* at 485-86, 102 S. Ct. 752. The Court emphasized that "'[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.'" *Id.* at 489, 102 S. Ct. 752 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227, 94 S. Ct. 2925, 41 L.Ed.2d 706 (1974)).

While *Valley Forge* remains good law, the Supreme Court in more recent opinions has indirectly broadened the notion of Establishment Clause standing in public education cases by holding that the mere enactment of a statute may constitute an Establishment Clause violation. In *Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2479, 86 L.Ed.2d 29 (1985), the Court considered an Establishment Clause challenge to an Alabama statute that originally had authorized a one-minute period of silence in public schools "for meditation," but was later amended to authorize a period of silence "for meditation or voluntary prayer." *Id.* at 40-42, 105 S. Ct. 2479. Although the previous form of the statute specifically allowed students to use the moment of silence for

"meditation," silent prayer was always an option. "[I]t is undisputed that at the time of the enactment of [the amended statute] there was no governmental practice impeding students from silently praying for one minute at the beginning of each schoolday." *Id.* at 57 n.45, 105 S. Ct. 2479. Nor were students, under the amended form of the statute, compelled to use the allotted time for prayer. In sum, the amendment to the Alabama statute had no discernible effect on public school students other than to inform them that the state was encouraging them to engage in prayer during their daily moment of silence. Because the Supreme Court has repeatedly held that standing is a jurisdictional requirement, the existence of which each federal court must determine for itself, *see Lujan*, 504 U.S. at 559-561, 112 S. Ct. 2130; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31, 110 S. Ct. 596, 107 L.Ed.2d 603 (1990), we may presume that in *Wallace* the Court examined the standing question before deciding the merits, and that the Court determined that the schoolchildren's parents had standing to challenge the amended Alabama statute.

Our reading of *Wallace* is supported by *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S. Ct. 2266, 147 L.Ed.2d 295 (2000), where the Court upheld a facial challenge to a school district's policy of permitting, but not requiring, prayer initiated and led by a student at high school football games. Noting that "the Constitution also requires that we keep in mind 'the myriad, subtle ways in which the Establishment Clause values can be eroded,'" *id.* at 314, 120 S. Ct. 2266 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355, 79 L.Ed.2d 604, 694 (1984) (O'Connor, J., concurring)), the Court held that the "mere passage by

the District of a policy that has the purpose and perception of government establishment of religion," *id.*, violated the Establishment Clause. "[T]he *simple enactment* of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation." *Id.* at 316, 120 S. Ct. 2266 (emphasis added).

In *Wallace* and *Santa Fe*, the Court looked at the language of each statute, the context in which the statute was enacted, and its legislative history to determine that the challenged statute caused an injury in violation of the Establishment Clause. "We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer." *Id.* at 315, 120 S. Ct. 2266. Justice O'Connor's concurrence in *Wallace* noted that whether a statute actually conveys a message of endorsement of religion is "not entirely a question of fact . . . . The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as state endorsement of prayer in public schools." 472 U.S. at 76, 105 S. Ct. 2479 (O'Connor, J., concurring in judgment). In *Santa Fe*, "[t]he text and history of this policy . . . reinforce our objective student's perception that the prayer is, in actuality, encouraged by the school." 530 U.S. at 308, 120 S. Ct. 2266. In evaluating the purpose of the school district policy, the Court found "most striking . . . the evolution of the current policy." *Id.* at 309, 120 S. Ct. 2266. In *Wallace*, a review of the legislative history led the Court to conclude that enactment of the amended statute "was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose."

472 U.S. at 56, 105 S. Ct. 2479; *see also id.* at 57-60, 105 S. Ct. 2479.

Operating within the above-described legal landscape, we now turn to the question initially posed, namely, does Newdow have standing to challenge the 1954 Act? Initially, we note that the 1954 statute challenged by Newdow is similar to the Alabama statute struck down in *Wallace*. Neither statute works the traditional type of "injury in fact" that is implicated when a statute compels or prohibits certain activity, nor do the amendments brought about by these statutes lend themselves to "as-applied" constitutional review. Nevertheless, the Court in *Wallace*, at least implicitly, determined that the schoolchildren's parents had standing to attack the challenged statute. Moreover, the legislative history of the 1954 Act shows that the "under God" language was not meant to sit passively in the federal code unbeknownst to the public; rather, the sponsors of the amendment knew about and capitalized on the state laws and school district rules that mandate recitation of the Pledge. The legislation's House sponsor, Representative Louis C. Rabaut, testified at the Congressional hearing that "the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins," and this statement was incorporated into the report of the House Judiciary Committee. H.R. Rep. No. 83-1693, at 3 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2341. Taken within its context, the 1954 addendum was designed to result in the recitation of the words "under God" in school classrooms throughout the land on a daily basis, and therefore constituted as much of an injury-in-fact as the policies considered in *Wallace* and

Santa Fe. As discussed earlier, Newdow has standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter. The mere enactment of the 1954 Act in its particular context constitutes a religious recitation policy that interferes with Newdow's right to direct the religious education of his daughter. Accordingly, we hold that Newdow has standing to challenge the 1954 Act.

D. Establishment Clause

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion," U.S. Const. amend. I, a provision that "the Fourteenth Amendment makes applicable with full force to the States and their school districts." *Lee v. Weisman*, 505 U.S. 577, 580, 112 S. Ct. 2649, 120 L.Ed.2d 467 (1992). Over the last three decades, the Supreme Court has used three interrelated tests to analyze alleged violations of the Establishment Clause in the realm of public education: the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L.Ed.2d 745 (1971); the "endorsement" test, first articulated by Justice O'Connor in her concurring opinion in *Lynch*, and later adopted by a majority of the Court in *County of Allegheny v. ACLU*, 492 U.S. 573, 109 S. Ct. 3086, 106 L.Ed.2d 472 (1989); and the "coercion" test first used by the Court in *Lee*.

In 1971, in the context of unconstitutional state aid to nonpublic schools, the Supreme Court in *Lemon* set forth the following test for evaluating alleged Establishment Clause violations. To survive the "*Lemon* test," the government conduct in question (1) must have a secular purpose, (2) must have a principal or

primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13, 91 S. Ct. 2105. The Supreme Court applied the *Lemon* test to every Establishment case it decided between 1971 and 1984, with the exception of *Marsh v. Chambers*, 463 U.S. 783, 103 S. Ct. 3330, 77 L.Ed.2d 1019 (1983), the case upholding legislative prayer.[4] *See Wallace*, 472 U.S. at 63, 105 S. Ct. 2479 (Powell, J., concurring).

In the 1984 *Lynch* case, which upheld the inclusion of a nativity scene in a city's Christmas display, Justice O'Connor wrote a concurring opinion in order to suggest a "clarification" of Establishment Clause jurisprudence. 465 U.S. at 687, 104 S. Ct. 1355 (O'Connor, J., concurring). Justice O'Connor's "endorsement" test effectively collapsed the first two prongs of the *Lemon* test:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions. . . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are

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[4] In *Marsh*, the Court "held that the Nebraska Legislature's practice of opening each day's session with a prayer by a chaplain paid by the State did not violate the Establishment Clause of the First Amendment. [The] holding was based upon the historical acceptance of the practice that had become 'part of the fabric of our society.'" *Wallace*, 472 U.S. at 63 n.4, 105 S. Ct. 2479 (Powell, J., concurring) (quoting *Marsh*, 463 U.S. at 792, 103 S. Ct. 3330).

> outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Id. at 687-88, 91 S. Ct. 2105 (O'Connor, J., concurring).

The Court formulated the "coercion test" when it held unconstitutional the practice of including invocations and benedictions in the form of "nonsectarian" prayers at public school graduation ceremonies. *Lee*, 505 U.S. at 599, 112 S. Ct. 2649. Declining to reconsider the validity of the *Lemon* test, the Court in *Lee* found it unnecessary to apply the *Lemon* test to find the challenged practices unconstitutional. *Id.* at 587, 112 S. Ct. 2649. Rather, it relied on the principle that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so." *Id.* (citations and internal quotation marks omitted).[5] The Court first examined the degree

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[5] Although this formulation is referred to as the "coercion" test, it should be noted that coercion is not a *necessary* element in finding an Establishment Clause violation. "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion. . . ." *Engel v. Vitale*, 370 U.S. 421, 430, 82 S. Ct. 1261, 8 L.Ed.2d 601 (1962). "[T]his court has never relied on coercion alone as the touchstone of Establishment Clause analysis. To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the free Exercise Clause a redundancy." *Allegheny*, 492 U.S. at 628, 109 S. Ct. 3086 (O'Connor, J., concurring). "Over the years, this Court has declared the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement." *Lee*, 505 U.S. at 618, 112 S. Ct. 2649 (Souter, J., concurring).

of school involvement in the prayer, and found that "the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position." *Id.* at 590. The next issue the Court considered was "the position of the students, both those who desired the prayer and she who did not." *Id.* Noting that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," *id.* at 592, 112 S. Ct. 2649, the Court held that the school district's supervision and control of the graduation ceremony put impermissible pressure on students to participate in, or at least show respect during, the prayer, *id.* at 593, 112 S. Ct. 2649. The Court concluded that primary and secondary school children may not be placed in the dilemma of either participating in a religious ceremony or protesting. *Id.* at 594, 112 S. Ct. 2649.

Finally, in its most recent school prayer case, the Supreme Court applied the *Lemon* test, the endorsement test, and the coercion test to strike down a school district's policy of permitting student-led "invocations" before high school football games. *See Santa Fe*, 530 U.S. at 310-16, 120 S. Ct. 2266. Citing *Lee*, the Court held that "the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship." *Id.* at 312, 120 S. Ct. 2266. Applying the *Lemon* test, the Court found that the school district policy was facially unconstitutional because it did not have a secular purpose. *Id.* at 314-16. The Court also used language associated with the endorsement test. *Id.* at 315, 120 S. Ct. 2266 ("[T]his policy was implemented with the purpose of endorsing school prayer."); *id.* at 317, 120 S. Ct. 2266 ("Govern-

ment efforts to endorse religion cannot evade constitutional reproach based solely on the remote possibility that those attempts may fail.").

We are free to apply any or all of the three tests, and to invalidate any measure that fails any one of them. The Supreme Court has not repudiated *Lemon;* in *Santa Fe,* it found that the application of each of the three tests provided an independent ground for invalidating the statute at issue in that case; and in *Lee,* the Court invalidated the policy solely on the basis of the coercion test. Although this court has typically applied the *Lemon* test to alleged Establishment Clause violations, *see, e.g., Am. Family Ass'n, Inc. v. City and County of San Francisco,* 277 F.3d 1114, 1120-21 (9th Cir. 2002), we are not required to apply it if a practice fails one of the other tests. Nevertheless, for purposes of completeness, we will analyze the school district policy and the 1954 Act under all three tests.

We first consider whether the 1954 Act and the EGUSD's policy of teacher-led Pledge recitation survive the endorsement test. The magistrate judge found that "the ceremonial reference to God in the pledge does not convey endorsement of particular religious beliefs." Supreme Court precedent does not support that conclusion.

In the context of the Pledge, the statement that the United States is a nation "under God" is an endorsement of religion. It is a profession of a religious belief, namely, a belief in monotheism. The recitation that ours is a nation "under God" is not a mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic. Rather, the phrase "one nation under God" in the

context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism. The text of the official Pledge, codified in federal law, impermissibly takes a position with respect to the purely religious question of the existence and identity of God. A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," or a nation "under no god," because none of these professions can be neutral with respect to religion. "[T]he government must pursue a course of complete neutrality toward religion." *Wallace*, 472 U.S. at 60, 105 S. Ct. 2479. Furthermore, the school district's practice of teacher-led recitation of the Pledge aims to inculcate in students a respect for the ideals set forth in the Pledge, and thus amounts to state endorsement of these ideals. Although students cannot be forced to participate in recitation of the Pledge, the school district is nonetheless conveying a message of state endorsement of a religious belief when it requires public school teachers to recite, and lead the recitation of, the current form of the Pledge.

The Supreme Court recognized the normative and ideological nature of the Pledge in *Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L.Ed. 1628. There, the Court held unconstitutional a school district's wartime policy of punishing students who refused to recite the Pledge and salute the flag. *Id.* at 642, 63 S. Ct. 1178. The Court noted that the school district was compelling the students "to declare a belief," *id.* at 631, 63 S. Ct. 1178, and "requir[ing] the individual to communicate by word

and sign his acceptance of the political ideas [the flag] . . . bespeaks," *id.* at 633, 63 S. Ct. 1178. "[T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind." *Id.* The Court emphasized that the political concepts articulated in the Pledge[6] were idealistic, not descriptive: "'[L]iberty and justice for all,' if it must be accepted as descriptive of the present order rather than an ideal, might to some seem an overstatement." *Id.* at 634 n. 14, 63 S. Ct. 1178. The Court concluded that: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642, 63 S. Ct. 1178.

The Pledge, as currently codified, is an impermissible government endorsement of religion because it sends a message to unbelievers "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688, 104 S. Ct. 1355 (O'Connor, J., concurring). Justice Kennedy, in his dissent in *Allegheny*, agreed:

> [B]y statute, the Pledge of Allegiance to the Flag describes the United States as 'one nation under God.' To be sure, no one is obligated to recite this phrase, . . . but it borders on sophistry to suggest that the reasonable atheist would not feel less than a full member of the political community every time

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[6] *Barnette* was decided before "under God" was added, and thus the Court's discussion was limited to the political ideals contained in the Pledge.

> his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.

Allegheny, 492 U.S. at 672, 109 S. Ct. 3086 (Kennedy, J., dissenting) (citations and internal quotation marks omitted).[7] Consequently, the policy and the Act fail the endorsement test.

Similarly, the policy and the Act fail the coercion test. Just as in *Lee*, the policy and the Act place students in the untenable position of choosing between participating in an exercise with religious content or protesting. As the Court observed with respect to the graduation prayer in that case: "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Lee*, 505 U.S. at 592, 112 S. Ct. 2649. Although the defendants argue that the religious content of "one nation under God" is minimal, to an atheist or a believer in certain non-Judeo-Christian religions or philosophies, it may reasonably appear to be an attempt to enforce a "religious orthodoxy" of monotheism, and is therefore impermissible. The coercive effect of this policy is particularly pronounced in the school setting given the age and impressionability of schoolchildren, and their understanding that they are required to adhere to the norms set by their school, their teacher and their fellow students.[8] Furthermore, under *Lee*, the fact that

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[7] For Justice Kennedy, this result was a reason to reject the endorsement test.

[8] The "subtle and indirect" social pressure which permeates the classroom also renders more acute the message sent to non-

students are not required to participate is no basis for distinguishing *Barnette* from the case at bar because, even without a recitation requirement for each child, the mere fact that a pupil is required to listen every day to the statement "one nation under God" has a coercive effect.[9] The coercive effect of the Act is apparent from its context and legislative history, which indicate that the Act was designed to result in the daily recitation of the words "under God" in school classrooms. President Eisenhower, during the Act's signing ceremony, stated: "From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty." 100 Cong. Rec. 8618 (1954) (statement of Sen. Ferguson incorporating signing statement of President Eisenhower). Therefore, the policy and the Act fail the coercion test.[10]

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believing schoolchildren that they are outsiders. *See Lee*, 505 U.S. at 592-93, 112 S. Ct. 2649 (stating that "the risk of indirect coercion" from prayer exercises is particularly "pronounced" in elementary and secondary public school because students are subjected to peer pressure and public pressure which is "as real as any overt compulsion").

[9] The objection to the Pledge in *Barnette*, like in the case at bar, was based upon a religious ground. The Pledge in the classroom context imposes upon schoolchildren the constitutionally unacceptable choice between participating and protesting. Recognizing the severity of the effect of this form of coercion on children, the Supreme Court in *Lee* stated, "the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position." 505 U.S. at 593, 112 S. Ct. 2649.

[10] In *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970), this court, without reaching the question of standing, upheld the inscription of the phrase "In God We Trust" on our coins and currency. *But cf. Wooley v. Maynard*, 430 U.S. 705, 722, 97 S. Ct.

Finally we turn to the *Lemon* test, the first prong of which asks if the challenged policy has a secular purpose. Historically, the primary purpose of the 1954 Act was to advance religion, in conflict with the first prong of the *Lemon* test. The federal defendants "do not dispute that the words 'under God' were intended" "to recognize a Supreme Being," at a time when the government was publicly inveighing against atheistic communism. Nonetheless, the federal defendants argue that the Pledge must be considered as a whole when assessing whether it has a secular purpose. They claim that the Pledge has the secular purpose of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, 465 U.S. at 693, 104 S. Ct. 1355.

The flaw in defendants' argument is that it looks at the text of the Pledge "as a whole," and glosses over the 1954 Act. The problem with this approach is apparent when one considers the Court's analysis in *Wallace*. There, the Court struck down Alabama's statute mandating a moment of silence for "meditation or voluntary prayer" not because the final version "as a whole" lacked a primary secular purpose, but because the state legislature had amended the statute specifically and solely to add the words "or voluntary prayer." 472 U.S. at 59-60, 105 S. Ct. 2479.

1428, 51 L.Ed.2d 752 (1977) (Rehnquist, J., dissenting) (stating that the majority's holding leads logically to the conclusion that "In God We Trust" is an unconstitutional affirmation of belief). In any event, *Aronow* is distinguishable in many ways from the present case. The most important distinction is that school children are not coerced into reciting or otherwise actively led to participating in an endorsement of the markings on the money in circulation.

By analogy to *Wallace*, we apply the purpose prong of the *Lemon* test to the amendment that added the words "under God" to the Pledge, not to the Pledge in its final version. As was the case with the amendment to the Alabama statute in *Wallace*, the legislative history of the 1954 Act reveals that the Act's *sole* purpose was to advance religion, in order to differentiate the United States from nations under communist rule." [T]he First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion." *Id.* at 56, 105 S. Ct. 2479 (citations omitted) (applying the *Lemon* test). As the legislative history of the 1954 Act sets forth:

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.

H.R. Rep. No. 83-1693, at 1-2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340. This language reveals that the purpose of the 1954 Act was to take a position on the question of theism, namely, to support the existence and moral authority of God, while "deny[ing] . . .

atheistic and materialistic concepts." *Id.* Such a purpose runs counter to the Establishment Clause, which prohibits the government's endorsement or advancement not only of one particular religion at the expense of other religions, but also of religion at the expense of atheism.

> [T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of a free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among "religions"—to encompass intolerance of the disbeliever and the uncertain.

Wallace, 472 U.S. at 52-54, 105 S. Ct. 2479.

In language that attempts to prevent future constitutional challenges, the sponsors of the 1954 Act expressly disclaimed a religious purpose. "This is not an act establishing a religion. . . . A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God. The phrase 'under God' recognizes only the guidance of God in our national affairs." H.R. Rep. No. 83-1693, at 3 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2341-42. This alleged distinction is irrelevant for constitutional purposes. The Act's affirmation of "a belief in the sovereignty of God" and its recognition of "the guidance of God" are endorsements by the government of reli-

gious beliefs. The Establishment Clause is not limited to "religion as an institution"; this is clear from cases such as *Santa Fe*, where the Court struck down student-initiated and student-led prayer at high school football games. 530 U.S. at 310-16, 120 S. Ct. 2266. The Establishment Clause guards not only against the establishment of "religion as an institution," but also against the endorsement of religious ideology by the government. Because the Act fails the purpose prong of *Lemon*, we need not examine the other prongs. *Lemon*, 403 U.S. at 612-14, 91 S. Ct. 2105.

Similarly, the school district policy also fails the *Lemon* test. Although it survives the first prong of *Lemon* because, as even Newdow concedes, the school district had the secular purpose of fostering patriotism in enacting the policy, the policy fails the second prong. As explained by this court in *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993), and by the Supreme Court in *School District of Grand Rapids v. Ball*, 473 U.S. 373, 390, 105 S. Ct. 3216, 87 L.Ed.2d 267 (1985), the second *Lemon* prong asks "whether the challenged government action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."[11] *Ball*, 473

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[11] Although *Ball* was overruled in part by *Agostini* v. *Felton*, 521 U.S. 203, 236, 117 S. Ct. 1997, 138 L.Ed.2d 391 (1997), as the Court stated in *Agostini*, *Ball*'s statement of the general principles and relevant tests to be used in determining what constitutes an Establishment Clause violation remain intact; only the underlying factual assumptions and presumptions have changed. In particular, the Court rejected the following three core assumptions of *Ball*:

U.S. at 390, 105 S. Ct. 3216. Given the age and impressionability of schoolchildren, as discussed above, particularly within the confined environment of the classroom, the policy is highly likely to convey an impermissible message of endorsement to some and disapproval to others of their beliefs regarding the existence of a monotheistic God. Therefore the policy fails the effects prong of *Lemon*, and fails the *Lemon* test. In sum, both the policy and the Act fail the *Lemon* test as well as the endorsement and coercion tests.[12]

(i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking.

Agostini, 521 U.S. at 222, 117 S. Ct. 1997. Therefore, *Ball*'s restatement of the second prong of *Lemon* remains valid even after *Agostini*.

[12] We recognize that the Supreme Court has occasionally commented in dicta that the presence of "one nation under God" in the Pledge of Allegiance is constitutional. *See Allegheny*, 492 U.S. at 602-03, 109 S. Ct. 3086; *Lynch*, 465 U.S. at 676, 104 S. Ct. 1355; *id.* at 693, 104 S. Ct. 1355 (O'Connor, J., concurring); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 303-04, 83 S. Ct. 1560, 10 L.Ed.2d 844 (1963) (Brennan, J., concurring); *id.* at 306-08, 83 S. Ct. 1560 (Goldberg, J., joined by Harlan, J., concurring); *Engel*, 370 U.S. at 435 n. 21, 82 S. Ct. 1261. However, the Court has never been presented with the question directly, and has always clearly refrained from deciding it. Accordingly, it has never applied any of the three tests to the Act or to any school policy regarding the recitation of the Pledge. That task falls to us, although the final word, as always, remains with the Supreme Court.

The only other United States Court of Appeals to consider the issue is the Seventh Circuit, which held in *Sherman v. Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992), that a policy similar to the one before us regarding the recitation of the Pledge of Allegiance containing the words "one nation under God" was constitutional. The *Sherman* court first stated that:

> If as *Barnette* holds no state may require anyone to recite the Pledge, and if as the prayer cases hold the recitation by a teacher or rabbi of unwelcome words is coercion, then the Pledge of Allegiance becomes unconstitutional under all circumstances, just as no school may read from a holy scripture at the start of class.

980 F.2d at 444. It then concludes, however, that this reasoning is flawed because the First Amendment "[does] not establish general rules about speech or schools; [it] call[s] for religion to be treated differently." *Id.* We have some difficulty understanding this statement; we do not believe that the Constitution prohibits compulsory patriotism as in *Barnette*, but permits compulsory religion as in this case. If government-endorsed religion is to be treated differently from government-endorsed patriotism, the treatment must be less favorable, not more.

The Seventh Circuit makes an even more serious error, however. It not only refuses to apply the *Lemon* test because of the Supreme Court's criticism of that test in *Lee*, but it also fails to apply the coercion test from *Lee* or the endorsement test from *Lynch*. Circuit courts are not free to ignore Supreme Court precedent in this manner. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L.Ed.2d 526 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Instead of applying any of the tests announced by the Supreme Court, the Seventh Circuit simply frames the question as follows: "Must ceremonial references in civic life to a deity be understood as prayer, or support for all monotheistic religions, to the exclusion of atheists and those who worship multiple gods?" 980 F.2d at 445. Relying in part on Supreme Court dicta regarding the Pledge, the court answers this question in the negative, determining that "under God" is a statement

In conclusion, we hold that (1) the 1954 Act adding the words "under God" to the Pledge, and (2) EGUSD's policy and practice of teacher-led recitation of the Pledge, with the added words included, violate the Establishment Clause. The judgment of dismissal is vacated with respect to these two claims, and the cause is remanded for further proceedings consistent with our holding. Plaintiff is to recover costs on this appeal.

REVERSED AND REMANDED.

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which, taken within its context in the Pledge, is devoid of any significant religious content, and therefore constitutional. *Id.* at 447-48. At the very least, as discussed above in the text, the Supreme Court requires that any policy alleged to be an Establishment Clause violation must be held to the scrutiny of the established tests. Our application of *all* of the tests compels the conclusion that the policy and the Act challenged here violate the Establishment Clause of the Constitution. Thus, we must respectfully differ from the Seventh Circuit.

FERNANDEZ, Circuit Judge, concurring and dissenting:

I concur in parts A, B and C[1] of the majority opinion, but dissent as to part D.

We are asked to hold that inclusion of the phrase "under God" in this nation's Pledge of Allegiance violates the religion clauses of the Constitution of the United States. We should do no such thing. We should, instead, recognize that those clauses were not designed to drive religious expression out of public thought; they were written to avoid discrimination.

We can run through the litany of tests and concepts which have floated to the surface from time to time. Were we to do so, the one that appeals most to me, the one I think to be correct, is the concept that what the religion clauses of the First Amendment require is neutrality; that those clauses are, in effect, an early kind of equal protection provision and assure that government will neither discriminate for nor discriminate against a religion or religions. *See Gentala v. City of Tucson*, 244 F.3d 1065, 1083-86 (9th Cir.) (en banc) (Fernandez, J., dissenting), *cert. granted and judgment vacated by* 534 U.S. 946, 122 S. Ct. 340, 151 L.Ed.2d 256 (2001); *Goehring v. Brophy*, 94 F.3d 1294,

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[1] I admit, however, to serious misgivings about standing to attack 4 U.S.C. § 4 itself. Congress has not compelled anyone to do anything. It surely has not directed that the Pledge be recited in class; only the California authorities have done that. Even if a general lack of standing to directly attack 4 U.S.C. § 4 would deprive federal courts of the opportunity to strike "under God" from that statute, any lament would be no more than a complaint about the limits on federal judges' constitutional power. Nonetheless, that ultimately makes little difference to the resolution of the First Amendment issue in this case.

1306-07 (9th Cir. 1996) (Fernandez, J., concurring). But, legal world abstractions and ruminations aside, when all is said and done, the danger that "under God" in our Pledge of Allegiance will tend to bring about a theocracy or suppress somebody's beliefs is so minuscule as to be de minimis. The danger that phrase presents to our First Amendment freedoms is picayune at most.

Judges, including Supreme Court Justices, have recognized the lack of danger in that and similar expressions for decades, if not for centuries, as have presidents[2] and members of our Congress. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 602-03, 672-73, 109 S. Ct. 3086, 3106, 3143, 106 L.Ed.2d 472 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 78 n. 5, 105 S. Ct. 2479, 86 L.Ed.2d 29 (1985); *Lynch v. Donnelly*, 465 U.S. 668, 676, 693, 716, 104 S. Ct. 1355, 1361, 79 L.Ed.2d 604 (1984); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 306-08, 83 S. Ct. 1560, 1615-16, 10 L.Ed.2d 844 (1963);[3] *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 622 (9th Cir. 1996) (O'Scannlain, J., concurring); *Gaylor v. United States*, 74 F.3d 214, 217-18 (10th Cir. 1996); *Sherman v. Cmty Consol. Sch. Dist. 21*, 980 F.2d 437, 445-48 (7th Cir. 1992); *O'Hair v.*

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[2] *See, e.g., Lee v. Weisman*, 505 U.S. 577, 632-35, 112 S. Ct. 2649, 120 L.Ed.2d 467 (1992) (Scalia, J., dissenting).

[3] The citations to the four preceding Supreme Court opinions are to majority opinions, concurring opinions, and dissents. Because my point is that a number of Justices have recognized the lack of danger and because I hope to avoid untoward complication in the setting out of the citations, I have not designated which Justices have joined in which opinion. All in all, however, perusing those opinions indicates that Chief Justice Burger, Chief Justice Rehnquist, and Justices Harlan, Brennan, White, Goldberg, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia, and Kennedy have so recognized.

Murray, 588 F.2d 1144, 1144 (5th Cir. 1979) (per curiam); *Aronow v. United States*, 432 F.2d 242, 243-44 (9th Cir. 1970); *cf. Marsh v. Chambers*, 463 U.S. 783, 795, 103 S. Ct. 3330, 77 L.Ed.2d 1019 (1983) (legislative prayer). I think it is worth stating a little more about two of the cases which I have just cited. In *County of Allegheny*, 492 U.S. at 602-03, 109 S. Ct. at 3106, the Supreme Court had this to say: "Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." The Seventh Circuit, reacting in part to that statement, has wisely expressed the following thought:

> Plaintiffs observe that the Court sometimes changes its tune when it confronts a subject directly. True enough, but an inferior court had best respect what the majority says rather than read between the lines. If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so.

Sherman, 980 F.2d at 448.

Some, who rather choke on the notion of de minimis, have resorted to the euphemism "ceremonial deism." *See, e.g., Lynch*, 465 U.S. at 716, 104 S. Ct. at 1382 (Brennan, J., dissenting). But whatever it is called (I care not), it comes to this: such phrases as "In God We Trust," or "under God" have no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity.

Those expressions have not caused any real harm of that sort over the years since 1791, and are not likely to do so in the future.[4] As I see it, that is not because they are drained of meaning.[5] Rather, as I have already indicated, it is because their tendency to establish religion (or affect its exercise) is exiguous. I recognize that some people may not feel good about hearing the phrases recited in their presence, but, then, others might not feel good if they are omitted. At any rate, the Constitution is a practical and balanced charter for the just governance of a free people in a vast territory. Thus, although we do feel good when we contemplate the effects of its inspiring phrasing and majestic promises, it is not primarily a feel-good prescription.[6] In *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 630, 642, 63 S. Ct. 1178, 1181, 1187, 87 L.Ed. 1628 (1943), for example, the Supreme Court did not say that the Pledge could not be recited in the presence of Jehovah's Witness children; it merely said that they did not have to recite it.[7] That fully protected their con-

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[4] They have not led us down the long path to kulturkampf or worse. Those who are somehow beset by residual doubts and fears should find comfort in the reflection that no baleful religious effects have been generated by the existence of similar references to a deity throughout our history. More specifically, it is difficult to detect any signs of incipient theocracy springing up since the Pledge was amended in 1954.

[5] *See also Sherman*, 980 F.2d at 448 (Manion, J., concurring).

[6] We, by the way, indicated as much in *American Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1125-26 (9th Cir. 2002), which involved governmental conduct that was much more questionable than adoption of the phrase "under God." *See id.* at 1126-28 (Noonan, J., dissenting).

[7] I recognize that the Pledge did not then contain the phrase "under God."

stitutional rights by precluding the government from trenching upon "the sphere of intellect and spirit." *Id.* at 642, 63 S. Ct. at 1187. As the Court pointed out, their religiously based refusal "to participate in the ceremony [would] not interfere with or deny rights of others to do so." *Id.* at 630, 63 S. Ct. at 1181. We should not permit Newdow's feel-good concept to change that balance.

My reading of the stelliscript suggests that upon Newdow's theory of our Constitution, accepted by my colleagues today, we will soon find ourselves prohibited from using our album of patriotic songs in many public settings. "God Bless America" and "America the Beautiful" will be gone for sure, and while use of the first three stanzas of "The Star Spangled Banner" will still be permissible, we will be precluded from straying into the fourth.[8] And currency beware! Judges can accept those results if they limit themselves to elements and tests, while failing to look at the good sense and principles that animated those tests in the first place. But they do so at the price of removing a vestige of the awe we all must feel at the immenseness of the universe and our own small place within it, as well as the wonder we must feel at the good fortune of our country. That will cool the febrile nerves of a few at the cost of removing the healthy glow conferred upon many citizens when the forbidden verses, or phrases, are uttered, read, or seen.

In short, I cannot accept the eliding of the simple phrase "under God" from our Pledge of Allegiance, when it is obvious that its tendency to establish religion

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[8] Nor will we be able to stray into the fourth stanza of "My Country 'Tis of Thee" for that matter.

in this country or to interfere with the free exercise (or non-exercise) of religion is de minimis.[9]

Thus, I respectfully concur in part and dissent in part.

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[9] Lest I be misunderstood, I must emphasize that to decide this case it is not necessary to say, and I do not say, that there is such a thing as a de minimis constitutional violation. What I do say is that the de minimis tendency of the Pledge to establish a religion or to interfere with its free exercise is no constitutional violation at all.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-16423
D.C. No. CV 00-00495-MLS/PAN

MICHAEL A. NEWDOW, PLAINTIFF-APPELLANT

v.

U.S. CONGRESS; UNITED STATES OF AMERICA; GEORGE W. BUSH,* PRESIDENT OF THE UNITED STATES; STATE OF CALIFORNIA; ELK GROVE UNIFIED SCHOOL DISTRICT; DAVID W. GORDON, SUPERINTENDENT EGUSD; SACRAMENTO CITY UNIFIED SCHOOL DISTRICT; JIM SWEENEY, SUPERINTENDENT SCUSD, DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Eastern District of California, Milton L. Schwartz, Senior Judge, Presiding

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Argued and Submitted: March 14, 2002
Filed: June 26, 2002
Amended: February 28, 2003

ORDER

The opinion filed June 26, 2002, is ordered amended. The Clerk is instructed to file the amended opinion with

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* George W. Bush is substituted for his predecessor, William Jefferson Clinton, as President of the United States. Fed. R. App. P. 43(c)(2).

Judge Fernandez's amended concurrence/dissent. Judge Reinhardt's concurrence in the order denying rehearing en banc, along with Judge O'Scannlain's and Judge McKeown's dissent from that order shall also be filed.

The Clerk is also instructed not to accept for filing any new petitions for rehearing and petitions for rehearing en banc in this case.

With the opinion thus amended, the panel has voted unanimously to deny the petitions for rehearing.

The full court has been advised of the petitions for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petitions for rehearing are DENIED and the petitions for rehearing en banc are DENIED.

REINHARDT, Circuit Judge, concurring in the order:

My views as to the merits of this issue are set forth in the amended majority opinion authored by Judge Goodwin, and I adhere to them fully. I write separately for two reasons unrelated to the contents of that opinion. I write first to comment on the separate dissent to the denial of rehearing en banc authored by Judge McKeown and joined in by Judges Hawkins, Thomas, and Rawlinson, in which my colleagues appear to express the view that a case should be reheard en banc whenever it involves "a question of exceptional importance." FED. R. APP. P. 35(a)(2).[1] Second, I am

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[1] While the brief separate dissent is deliberately opaque and uninformative, I would suspect that not all of its signatories

compelled to register my strong disagreement with one particularly unfortunate aspect of Judge O'Scannlain's principal dissent that reflects a serious misconception of fundamental constitutional principles and the proper role of the federal judiciary.

I

As to the first question, I disagree with the notion that the importance of an issue is a sufficient reason to take a case en banc, either under the Rule or as a matter of judicial policy. Rule 35(a) advises this court of its *discretionary* power to order that a case already decided by a three-judge panel be reheard by the full court. Specifically, the rule begins by stating that a "majority of the circuit judges who are in regular active service *may* order that an appeal or other proceeding be heard or reheard by the court of appeals en banc." FED. R. APP. P. 35(a) (emphasis added). Subsection two guides such discretionary consideration by stating that one compelling reason to grant rehearing en banc is the "exceptional importance" of a particular case.

The most reasonable construction of the Rule is that this court should rehear a case en banc when it is *both* of exceptional importance *and* the decision *requires correction*. *See United States* v. *Burdeau*, 180 F.3d 1091, 1092 (9th Cir. 1999) (Tashima, J., concurring in the order denying rehearing en banc) ("Subject to rare exceptions. . . . we should review the statements in three[-]judge panel opinions only to 'determine whether the [panel's] legal error resulted in an erroneous

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believe that the general rule they appear to advocate should apply regardless of the "correctness" of the panel opinion. The concept that "exceptional importance" is, without more, a sufficient reason for en banc review is, however, shared by at least several members of the Court and accordingly merits some discussion.

judgment . . . . .'") (quoting *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council*, 467 U.S. 837, 842 (1984)). A decision may warrant correction because a three-judge panel has reached a result or adopted a legal rule or principle that conflicts with our existing circuit law or that the majority of our court believes is incorrect and needs further review. The fact that three-judge panels often decide cases of exceptional importance, whether it be the constitutionality of a state's decision to execute an individual who may be innocent, the existence or non-existence of a fundamental right, or the ability of the Congress to require the states to comply with federal law—an issue that some of us thought had been settled by the successful end to the Civil War—is an unremarkable, but undeniably important, aspect of our appellate system. *See* Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 218 (1999) (stating that three-judge panels "representing and acting on behalf of the whole court" is a "basic tenet of our intermediate appellate system"). Unless reconsidered en banc, a decision of a three-judge panel *is* a decision of our court and speaks for our court. Moreover, it ordinarily constitutes the final judicial decision.[2]

To rehear a case en banc *simply* on the basis that it involves an important issue would undermine the three-

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[2] While the Supreme Court unquestionably has the authority to review any or all of the decisions of the Court of Appeals, the Court has elected to hear a remarkably small number of cases in recent years. For example, in the 2001 term, of the 7,852 case filings, the Court heard argument in 88 cases, and disposed of 85 in 76 signed opinions. *See* Supreme Court of the United States, *2002 Year-End Report on the Federal Judiciary*, *at* http://www.supremecourtus.gov/publicinfo/year-end/2002year-endreport.html.

judge panel system and create an impractical and crushing burden on what otherwise should be, as Rule 35(a) suggests, an exceptional occurrence. *See* FED. R. APP. P. 35(a) ("An en banc hearing or rehearing is not favored . . . ."). According to statistics kept by the Clerk of the court, in 2002 this court decided 5,190 cases on the merits, more than 98% of which were finally decided by three-judge panels. These decisions are not measures of "rough justice," later to be refined by the en banc court. Unless they decide issues of exceptional importance erroneously, create a direct intra-circuit split, or unless the interests of justice require that the decision be corrected, the opinions of three-judge panels should constitute the final action of this court.

II

I also feel compelled to discuss a disturbingly wrong-headed approach to constitutional law manifested in the dissent authored by Judge O'Scannlain. The dissent suggests that this court should be able to conclude that the panel's holding was erroneous by observing the "public and political reaction" to its decision. Dissent at 2783. This is not the first time that the magnitude of the political response regarding an issue has distracted certain members of this court. An equally disturbing misunderstanding of the nature of our Constitution and the role of the federal judiciary was manifested in *Coalition for Econ. Equity* v. *Wilson*, 122 F.3d 692 (9th Cir. 1997), a case involving a California initiative on the subject of affirmative action. There, the three-judge panel, in a case that unfortunately was not taken en banc, notwithstanding its exceptional importance, made the following remarkable statement: "A system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law

tests the integrity of our constitutional democracy." *Id.* at 699 (O'Scannlain, J.).

The Bill of Rights is, of course, intended to protect the rights of those in the minority against the temporary passions of a majority which might wish to limit their freedoms or liberties. As Justice Jackson recognized:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Va. State Bd. of Educ. v. *Barnette*, 319 U.S. 624, 638 (1943). It is the highest calling of federal judges to invoke the Constitution to repudiate unlawful majoritarian actions and, when necessary, to strike down statutes that would infringe on fundamental rights, whether such statutes are adopted by legislatures or by popular vote. The constitutional system that vests such power in an independent judiciary does not "test[ ] the integrity of . . . democracy." It makes democracy vital, and is one of our proudest heritages.

Moreover, Article III judges are by constitutional design insulated from the political pressures governing members of the other two branches of government. We are given life tenure and a secured salary so that, in our unique capacity to "say what the law is," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), we may decide constitutional issues without regard to popular

vote, political consequence, or the prospect of future career advancement.[3] Most federal judges do not question the wisdom of this approach. When the federal judiciary is so firmly separated by constitutional structure from the direct influence of politics, we must not undermine that structure by allowing political pressures, polls, or "focus groups" to influence our opinions, even indirectly.

This is not to say that federal judges should be completely sequestered from the attitudes of the nation we serve, even though our service is accomplished not through channeling popular sentiment but through strict adherence to established constitutional principles. The Constitution contemplates occasions when we must be responsive to *long-term* societal trends—when determining, for example, that which is "cruel and unusual," *see Hudson* v. *McMillian*, 503 U.S. 1, 9 (1992), whether in the execution of the mentally retarded, *see Atkins* v. *Virginia*, 536 U.S. 304, ___, 122 S. Ct. 2242, 2247 (2002), or the execution of juvenile offenders, *see In re Stanford*, 123 S.Ct. 472, 474 (2002) (Stevens, J., dissenting from the denial of an application for an original writ of habeas corpus). This broader long-term

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[3] Alexander Hamilton was admirably cognizant of the danger of relying on temporary political whimsy:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

THE FEDERALIST NO. 78, at 437 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

social conscience, however, is a matter far different from responding to particular immediate political pressures. We may not—we must not—allow public sentiment or outcry to guide our decisions. It is particularly important that we understand the nature of our obligations and the strength of our constitutional principles in times of national crisis; it is then that our freedoms and our liberties are in the greatest peril. Any suggestion, whenever or wherever made, that federal judges should be encouraged by the approval of the majority or deterred by popular disfavor is fundamentally inconsistent with the Constitution and must be firmly rejected.

O'SCANNLAIN, Circuit Judge, with whom KLEINFELD, GOULD, TALLMAN, RAWLINSON, and CLIFTON, Circuit Judges, join, dissenting from the denial of rehearing en banc:

Last June, a two-judge majority of a three-judge panel of this court ruled that the Pledge of Allegiance was unconstitutional simply because of the presence of two offending words: "under God." It was an exercise in judicial legerdemain which, not surprisingly, produced a public outcry across the nation. Since that time we, as a court, have had the opportunity to order reconsideration of that decision en banc, yet a majority of the 24 active judges eligible to vote has decided not to do so. While there are, no doubt, varied and plausible reasons why this result occurred, I respectfully conclude that our court has made a serious mistake and thus must dissent from its order denying reconsideration.

I

While I cannot say that a randomly selected 11-judge panel would have ruled differently, I believe that neither the June 2002 version, *Newdow* v. *United States Congress*, 292 F.3d 597 (9th Cir. 2002) ("*Newdow* I"), nor today's slightly revised version, ___ F.3d ___ ("*Newdow II*") to essentially the same effect, is defensible. We should have reheard *Newdow I* en banc, not because it was controversial, but because it was wrong, very wrong—wrong because reciting the Pledge of Allegiance is simply not "a religious act" as the two-judge majority asserts, wrong as a matter of Supreme Court precedent properly understood, wrong because it set up a direct conflict with the law of another circuit,

and wrong as a matter of common sense.[1] We should have given 11 judges a chance to determine whether the two-judge majority opinion truly reflects the law of the Ninth Circuit.[2] Reciting the Pledge of Allegiance cannot possibly be an "establishment of religion" under *any* reasonable interpretation of the Constitution.[3]

Perhaps in an effort to avoid ultimate Supreme Court review, *Newdow II* which replaces it, avoids expressly reaching the technical question of the constitutionality of the 1954 Act. Fundamentally, however, the amended decision is every bit as bold as its predecessor. It bans

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1 Judge Reinhardt's protestations to the contrary notwithstanding, I, too, believe that "[o]ur judicial charge is to stand above the inflamed passions of the public." *Dazo* v. *Globe Airport Sec. Serv.*, 295 F.3d 934, 943 (9th Cir. 2002) (O'Scannlain, J., concurring and dissenting). My disagreement with the panel majority has nothing to do with bending to the will of an outraged populace, and everything to do with the fact that Judge Goodwin and Judge Reinhardt misinterpret the Constitution and 40 years of Supreme Court precedent. That most people understand this makes the decision no less wrong. It doesn't take an Article III judge to recognize that the voluntary recitation of the Pledge of Allegiance in public school does not violate the First Amendment.

2 This case presents the classic situation required for our court to rehear a case en banc. En banc consideration would have allowed us to correct the error of a prior panel's decision with respect to the Pledge *and* resolve a constitutional question of exceptional importance that affects the lives of millions of school children who reside within the geographical boundaries of the Ninth Circuit. *See* Fed. R. App. P. 35(a). The exceptional importance of this case reinforces the need for correction of the panel's mistaken view of our Constitution.

3 U.S. Const. Amend. I. ("Congress shall make no law respecting an *establishment of religion*, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.") (emphasis added).

the voluntary recitation of the Pledge of Allegiance in the public schools of the nine western states thereby directly affecting over 9.6 million students,[4] necessarily *implies* that both an Act of Congress[5] and a California law[6] are unconstitutional, clearly conflicts with the Seventh Circuit's decision in *Sherman* v. *Cmty. Consol. Sch. Dist. 21 of Wheeling Township*, 980 F.2d 437 (1992), and threatens cash-strapped school districts and underpaid teachers with the specter of civil actions for money damages pursuant to 42 U.S.C. § 1983.

Newdow I, the subject of our en banc vote, no longer exists; it was withdrawn after the en banc call failed. The panel majority has evolved to this extent: in *Newdow I* the Pledge was unconstitutional for everybody; in *Newdow II* the Pledge is only unconstitutional for public school children and teachers. The remainder of this dissent is directed entirely to *Newdow II*, which, as shall be demonstrated, differs little from *Newdow I* in its central holding. With grim insistence, the majority in *Newdow II* continues to stand by its original error—that voluntary recitation of the Pledge of Alle-

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[4] *See* U.S. Dep't of Ed., Nat'l Ctr. for Ed. Statistics, available at http://nces.ed.gov/pubs2002/snf_report/table_01_1.asp. The approximate figure is for the school year 2000-01, comprising the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington,

[5] 4 U.S.C. § 4 ("The Pledge of Allegiance to the Flag: 'I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.' ").

[6] Cal. Educ. Code § 52720. This section provides that "at the beginning of the first regularly scheduled class or activity period . . . there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section."

giance in public school violates the Establishment Clause because, according to the two-judge panel majority, it is "a religious act." *Newdow II*, ___ F.3d at ___. Common sense would seem to dictate otherwise, as the public and political reaction should by now have made clear. If reciting the Pledge is truly "a religious act" in violation of the Establishment Clause, then so is the recitation of the Constitution[7] itself, the Declaration of Independence,[8] the Gettysburg Address,[9] the National Motto,[10] or the singing of the National Anthem.[11] Such an assertion would make hypocrites out of the Founders, and would have the effect of

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[7] U.S. Const. Art. VII. ("Year of *our Lord*") (emphasis added).

[8] The Declaration of Independence contains multiple references to God. The founders claimed the right to "dissolve the political bands" based on "the Laws of Nature and of *Nature's God*." The most famous passage, of course, is that "all men are created equal, that they are endowed by *their Creator* with certain unalienable Rights." Subsequently, the signatories "appeal[ ] to the *Supreme Judge of the world* to rectify their intentions."

[9] On November 19, 1863, President Lincoln declared "that this Nation, *under* God, shall have a new birth of freedom—and that Government of the people, by the people, for the people, shall not perish from the earth."

[10] *See* 36 U.S.C. § 302. (" '*In God* we trust' is the national motto.") (emphasis added).

[11] *See* 36 U.S.C. § 301(a) ("The composition consisting of the words and music known as the Star-Spangled Banner is the national anthem."). In fact, the Anthem is much more explicitly religious in content than the Pledge, and much more than a 'mere' profession of the *composer's* faith in a Supreme Being, as the majority would have it. *See Newdow II*, ___ F.3d at ___. Consider the following passage from the fourth stanza: "Blest with victory and peace, may the *heaven-rescued* land, Praise *the Power* that hath made and preserved us a nation. Then conquer we must, when our cause is just, And this be our motto: '*In God* is our trust.' "(emphasis added).

driving any and all references to our religious heritage out of our schools, and eventually out of our public life.

II

The *Newdow II* majority's primary legal argument is that the Supreme Court's decision in *Lee* v. *Weisman*, 505 U.S. 577 (1992), a school prayer case, controls the outcome of this case. In fact, rather than merely following *Lee* and its predecessors, the two-judge panel majority makes a radical departure from *Lee* and the cases it purports to apply. To understand why this is so, an examination of the Supreme Court's school prayer decisions which culminate in *Lee* is in order.

A

1

The fountainhead of all school prayer cases is *Engel* v. *Vitale*, 370 U.S. 421 (1962). In *Engel* the Court considered a school policy whereby children were directed to say aloud a prayer composed by state officials. The Court found that this practice was inconsistent with the Establishment Clause, reasoning that "[the] program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious." *Id.* at 424-25. The Court concluded by stating that the state should leave prayer, "that purely religious function, to the people themselves." *Id.* at 435. In a footnote, it reasoned as follows:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to

> express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

Id. at 435 n.21. The Court drew an explicit distinction between patriotic invocations of God on the one hand, and prayer, an "unquestioned religious exercise," on the other. Concurring, Justice Douglas wrote that the narrow question presented was whether the state "oversteps the bounds when it finances a religious exercise." *Id.* at 439 (Douglas, J., concurring). Justice Douglas noted that the Pledge of Allegiance, "like . . . prayer, recognizes the existence of a Supreme Being." *Id.* at 440 n.5. However, he noted that the House Report recommending the addition of the words "under God" to the Pledge stated that those words "in no way run contrary to the First Amendment but recognize 'only the guidance of God in our national affairs.'" *Id.* (quoting H.R. Rep. No. 1693, 83d Cong., 2d Sess., p. 3).

2

The following year, the Supreme Court decided *Abington School Dist.* v. *Schempp*, 374 U.S. 203 (1963). In that case, the Court considered the constitutionality of a Pennsylvania statute requiring that "[a]t least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day." *Id.* at 205. The practice in public schools

was for a teacher or student volunteer to read the required Bible verses each morning. This in turn was followed by a recitation of the Lord's prayer. Finally, the class would recite the Pledge of Allegiance to the Flag. *Id.* at 207-08. The Court struck down the Bible reading and the practice of reciting the Lord's prayer as a state prescribed "religious ceremony," *id.* at 223, but said nothing about the practice of reciting the Pledge.

As in *Engel*, the Court took pains to point to the character of the exercises it found wanting. The Court reasoned that "reading . . . the verses . . . possesses a devotional and religious character and constitutes in effect a religious observance. The devotional and religious nature of the morning exercises is made all the more apparent by the fact that the Bible reading is followed immediately by a recital in unison by the pupils of the Lord's prayer." *Id.* at 210. "The pervading religious character of the ceremony," wrote Justice Clark, "cannot be gainsaid," and led to the conclusion that the exercises violated the Establishment Clause. *Id.* at 224.

The concurring opinions in *Schempp* were all to the same effect. Justice Douglas agreed with the majority's conclusion that the practices at issue violated the Establishment Clause because "the State is conducting a religious exercise." *Id.* at 229 (Douglas, J., concurring). In a lengthy concurrence, Justice Brennan wrote that "[t]he religious nature of the exercises here challenged seems plain." *Id.* at 266 (Brennan, J., concurring). After surveying the history of devotional exercises in American public schools, Justice Brennan stated that "the panorama of history permits no other conclusion than that daily prayers and Bible readings in

the public schools have always been designed to be, and have been regarded as, essentially religious exercises." *Id.* at 277-78. For Justice Brennan, "religious exercises in the public schools present a unique problem" but "not every involvement of religion in public life violates the Establishment Clause." *Id.* at 294. He warned that "[a]ny attempt to impose rigid limits upon the mention of God . . . in the classroom would be fraught with dangers." *Id.* at 301. Specifically, he wrote that "[t]he reference to divinity in the revised pledge of allegiance . . . may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact." *Id.* at 304.

Justice Goldberg also wrote separately, stating that "the clearly religious practices presented in these cases are . . . wholly compelling." *Id.* at 305 (Goldberg, J., concurring). He reasoned that "[t]he pervasive religiosity and direct governmental involvement inhering in the prescription of prayer and Bible reading in the public schools . . . cannot realistically be termed simply accommodation." *Id.* at 307. Like Justice Brennan, Justice Goldberg cautioned that the decision "does not mean that all incidents of government which import of the religious are therefore and without more banned by the strictures of the Establishment Clause." *Id.* at 307-08. He then quoted in full the passage from *Engel* which drew a distinction between patriotic invocations of God, and unquestioned religious exercises that give rise to Establishment Clause violations. *Id.*

3

The next case in this line is *Wallace* v. *Jaffree*, 472 U.S. 38 (1985). That case considered the constitutionality of an Alabama statute authorizing a 1-minute period of silence in public schools "for meditation or voluntary prayer." *Id.* at 40. The Court found that "[t]he wholly religious character" of the challenged law was "plainly evident from its text." *Id.* at 58. The legislature's one and only purpose in enacting the law was "to return prayer to the public schools." *Id.* at 59-60. Justice Powell's separate concurrence was "prompted by Alabama's persistence in attempting to institute state-sponsored prayer in the public schools." *Id.* at 62 (Powell, J., concurring). Justice O'Connor wrote separately to suggest that moment-of-silence statutes were not "a religious exercise," and therefore were constitutional. *Id.* at 72 (O'Connor, J., concurring). Justice O'Connor wrote further that "the words 'under God' in the Pledge . . . serve as an acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.'" *Id.* at 78 n.5 (quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 693 (O'Connor, J., concurring)) (alterations in original). In contrast, the Alabama statute at issue was very different from the Pledge—the state had "intentionally crossed the line [by] affirmatively endorsing the particular religious practice of prayer." *Id.* at 84.

4

Finally, there is the Supreme Court's decision in *Lee* v. *Weisman*. The issue presented was "whether including clerical members who offer prayers as part of the official school graduation ceremony" is consistent

with the Establishment Clause. 505 U.S. at 580. The graduating students entered as a group in a processional, after which "the students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers." *Id.* at 583. Justice Kennedy wrote that "the significance of the prayers lies . . . at the heart of [the] case." *Id.* He framed the inquiry as follows:

> These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

Id. at 586.

The Court in *Lee* concluded that *Engel* and its progeny controlled the outcome, writing that "[c]onducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students." *Id.* at 587. As in *Engel*, *Schempp*, and *Wallace*, the crucial factor was the nature of the exercise in which the students were asked to participate. Time and again the Court went out of its way to stress the nature of the exercise, writing that prayer was "an overt religious exercise," *id.* at 588, and that "prayer exercises in public schools carry a particular risk of indirect coercion." *Id.* at 592. The practice was unconstitutional because "the State has in every practical sense compelled attendance and participation in an explicit re-

ligious exercise at an event of singular importance to every student." *Id.* at 598. Just like the decisions in *Engel* and *Schempp*, the Court in *Lee* took pains to stress the confines of its holding, concluding that "[w]e do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive," *id.* at 597, and that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Id.* at 598.

B

Two fundamental principles may therefore be derived from the school prayer cases culminating in *Lee*.

1

Formal religious observances are prohibited in public schools because of the danger that they may effect an establishment of religion. *See Engel*, 370 U.S. at 424-25 ("[D]aily classroom invocation of God's blessings . . . is a religious activity."); *Schempp*, 374 U.S. at 210 (Bible reading followed by the Lord's prayer "possesses a devotional and religious character and constitutes in effect a religious observance."); *Wallace*, 472 U.S. at 58 (Prayer is of a "wholly religious character."); *Lee*, 505 U.S. at 586 (Prayer written by state officials constitutes a "formal religious exercise"). In each of these cases, the Court took pains to stress that not every reference to God in public schools was prohibited. *See Engel*, 370 U.S. at 435 n.21 ("patriotic or ceremonial occasions" which contain "references to the Deity" bear "no true resemblance to the unquestioned religious exercise" of prayer); *Schempp*, 374 U.S. at 301 (Brennan, J., concurring) ("Any attempt to impose rigid limits upon the

mention of God . . . in the classroom would be fraught with dangers."); *Wallace*, 472 U.S. at 78 n.5 (O'Connor, J., concurring) ("the words 'under God' in the Pledge" are not unconstitutional); *Lee*, 505 U.S. at 598 ("A relentless and all-pervasive attempt to exclude religion . . . could itself become inconsistent with the Constitution.").

2

Once it is established that the state is sanctioning a formal religious exercise, then the fact that the students are not *required* to participate in the formal devotional exercises does not prevent those exercises from being unconstitutional. *See Engel*, 370 U.S. at 431 ("[T]he indirect coercive pressure upon religious minorities to conform" to the prayer exercises "is plain."); *Schempp*, 374 U.S. at 210-11 ("The fact that some pupils, or theoretically all pupils, might be excused from attendance at the exercises does not mitigate the obligatory nature of the ceremony."); *Wallace*, 472 U.S. at 57 (State-sanctioned *voluntary* prayer in public schools violates Establishment Clause); *Lee*, 505 U.S. at 592 ("[P]rayer exercises in public schools carry a particular risk of indirect coercion."). To be sure, *Lee* is the Court's most elaborate pronouncement with respect to indirect coercion. It identifies the circumstances in which indirect coercion may be said to be unconstitutional: when the government directs "the performance of a formal religious exercise" in such a way as to oblige the participation of objectors. *Lee*, 505 U.S. at 586.

III

No court, state or federal, has *ever* held, even now, that the Supreme Court's school prayer cases apply

outside a context of state-sanctioned formal religious observances. But *Newdow II* finesses all that, and the sleight of hand the majority uses becomes immediately apparent: obfuscate the nature of the exercise at issue and emphasize indirect coercion. The panel majority simply ignores, because they are inconvenient, the "dominant and controlling facts" in *Lee* and its predecessors: that Establishment Clause violations in public schools are triggered only when "State officials direct the performance of a *formal religious exercise*." 505 U.S. at 586 (emphasis added); *see also Schempp*, 374 U.S. at 210 ("devotional . . . religious observance" prohibited); *Wallace*, 472 U.S. at 58 (activities of a "wholly religious character" prohibited).

A

To avoid a flagrant inconsistency with *Lee*, and with 40 years of Supreme Court precedent, the two-judge panel majority must first examine whether the act of pledging allegiance is "a religious act." As the Seventh Circuit in *Sherman* framed it, "Does 'under God' make the Pledge a prayer, whose recitation violates the establishment clause of the first amendment?" 980 F.2d at 445. That court answered the question in the negative; the *Newdow II* majority, in conclusory fashion, simply *assumes* the affirmative. ___ F.3d at ___ ("[W]e conclude that the school district policy impermissibly coerces *a religious act*.") (emphasis added).

This assertion belies common sense. Most assuredly, to pledge allegiance to flag and country is a *patriotic* act. After the public and political reaction last summer, it is difficult to believe that anyone can continue to think otherwise. The fact the Pledge is infused with an undoubtedly religious reference does not change the

nature of the act itself. The California statute under which the school district promulgated its policy is entitled "[d]aily performance of *patriotic exercises* in public schools." Cal. Educ. Code § 52720 (emphasis added). The Pledge is recited not just in schools but also at various official events and public ceremonies, including perhaps the most patriotic of occasions—naturalization ceremonies. Generally, the Pledge is recited while standing, facing a United States flag, with the right hand held over the heart, much like the National Anthem. *See* 4 U.S.C. § 4 (articulating proper procedure for reciting Pledge); 36 U.S.C. § 301 (during anthem "all present . . . should stand at attention facing the flag with the right hand over the heart."). Whatever one thinks of the normative values underlying the Pledge, they are unquestionably patriotic in nature. Indeed, it is precisely because of the Pledge's explicitly patriotic nature that in 1943 the Supreme Court ruled that no one is *required* to Pledge allegiance against their will. *West Virginia* v. *Barnette*, 319 U.S. 624, 642 (1943).

In contrast, to pray is to speak directly to God, with bowed head, on bended knee, or some other reverent disposition. It is a solemn and humble approach to the divine in order to give thanks, to petition, to praise, to supplicate, or to ask for guidance. Communal prayer, by definition, is an even more forceful and profound experience for those present. Little wonder that the Supreme Court has recognized the "unique problem" and "particular risk" posed by school prayer to non-participating students. *Lee*, 505 U.S. at 592 ("[P]rayer exercises in public schools carry a particular risk of indirect coercion."); *Schempp*, 374 U.S. at 294 (Brennan,

J., concurring) (noting that prayers in public schools "present a unique problem").

Not only does the panel majority's conclusion that pledging allegiance is "a religious act" defy common sense, it contradicts our 200-year history and tradition of patriotic references to God. The Supreme Court has insisted that interpretations of the Establishment Clause must comport "with what history reveals was the contemporaneous understanding of its guarantees." *Lynch*, 465 U.S. at 673; *see also Schempp*, 374 U.S. at 294 ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.") (Brennan, J., concurring).

The majority's unpersuasive and problematic disclaimers notwithstanding, *Newdow II* precipitates a "war with our national tradition," *McCollum* v. *Bd. of Ed.*, 333 U.S. 203, 211 (1948), and as Judge Fernandez so eloquently points out in dissent, only the purest exercise in sophistry could save multiple references to our religious heritage in our national life from *Newdow II*'s axe. Of course, the Constitution itself explicitly mentions God, as does the Declaration of Independence, the document which marked us as a separate people. The Gettysburg Address, inconveniently for the majority, contains the *same precise phrase*—"under God"—found to constitute an Establishment Clause violation in the Pledge.[12] After *Newdow II*, are we to suppose that, were a school to permit—not require—the recitation of the Constitution, the Declaration of Independence, or the Gettysburg Address in public schools, that too would violate the Constitution? Were

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[12] *See infra* footnote 9.

the "founders of the United States . . . unable to understand their own handiwork[?]" *Sherman*, 980 F.2d at 445. Indeed, the recitation of the Declaration of Independence would seem to be the better candidate for the chopping block than the Pledge, since the Pledge does not require anyone to acknowledge the *personal* relationship with God to which the Declaration speaks.[13] So too with our National Anthem and our National Motto.

Our national celebration of Thanksgiving dates back to President Washington, which Congress stated was "to be observed by acknowledgment with grateful hearts, the many and signal favours of Almighty God." *Lynch*, 465 U.S. at 675 n.2. Congress made Thanksgiving a permanent holiday in 1941,[14] and Christmas has been a national holiday since 1894.[15] Are pere [*sic*] Newdow's constitutional rights violated when his daughter is told not to attend school on Thanksgiving? On Christmas day? Must school outings to federal courts be prohibited, lest the children be unduly influenced by the dreaded intonation "God save these United States and this honorable Court"?[16] A theory of the Establishment Clause that would have the effect of driving out of our public life the multiple references to

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[13] *See infra* footnote 8.

[14] *See* 5 U.S.C. § 6103(a).

[15] *See id.*

[16] Indeed, even our own court's formal announcement to open sessions contains the offending word: "Hear ye! hear ye! All persons having business with the honorable, the United States Court of Appeals for the Ninth Circuit will now draw near, give your attention and you will be heard, for this court is now in session. *God save* these United States and this honorable Court." (emphasis added).

the Divine that run through our laws, our rituals, and our ceremonies is no theory at all.

B

As if all of this were not enough, the Supreme Court has gone out of its way to make it plain that the Pledge itself passes constitutional muster. In two of the school prayer cases, the Court noted without so much as a hint of disapproval the fact that the students, in addition to being subject to formal religious observances, *also* recited the Pledge of Allegiance. *See Schempp*, 374 U.S. at 207-08 (noting that the practice in public schools consisted of Bible reading and recitation of the Lord's prayer, followed by recitation of the Pledge); *Lee*, 505 U.S. at 583 (noting that "the students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers.").

Several other Supreme Court cases contain explicit references to the constitutionality of the Pledge. *See Engel*, 370 U.S. at 440 n.5 (Douglas, J., concurring) ("[The Pledge] in no way run[s] contrary to the First Amendment") (quoting H.R. Rep. No. 1693, 83d Cong., 2d Sess., p. 3); *Schempp*, 374 U.S. at 304 (Brennan, J., concurring) ("[R]eciting the pledge may be no more of a religious exercise than the reading aloud of Lincolns' Gettysburg Address."); *Wallace*, 472 U.S. at 78 n.5 (O'Connor, J., concurring) ("[T]he words 'under God' in the Pledge . . . serve as an acknowledgment of religion."); *Co. of Allegheny* v. *ACLU*, 492 U.S. 573, 602-03 (Blackmun, J., for the court) ("Our previous opinions have considered in dicta . . . the pledge, characterizing [it] as consistent with the proposition that government may not communicate an endorsement of religious belief."); *Lynch* v. *Donnelly*, 465 U.S. 668,

676 (1984) (Burger, C.J., for the court) ("Other examples of reference to our religious heritage are found . . . in the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag. That pledge is recited by many thousands of public school children—and adults—every year.").

The panel majority's answer to these myriad statements from our high court is summarily to dismiss them as dicta. However, "dicta of the Supreme Court have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold. We should not blandly shrug them off because they were not a holding." *Zal* v. *Steppe*, 968 F.2d 924, 935 (9th Cir. 1992) (Noonan, J., concurring and dissenting in part); *see also United States* v. *Baird*, 85 F.3d 450, 453 (9th Cir. 1996) ("[W]e treat Supreme Court dicta with due deference.").[17]

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[17] Other courts have, unremarkably enough, not been so flippant when it comes to considering consistent Supreme Court dicta on this issue. *See Sherman*, 980 F.2d at 448 ("[A]n inferior court had best respect what the majority says rather than read between the lines. If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so."); *Gaylor* v. *United States*, 74 F.3d 214, 217 (10th Cir. 1996) ("[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements."); *ACLU* v. *Capital Square Review*, 243 F.3d 289, 301 n.10 (6th Cir. 2001) ("We should . . . be amazed if the Supreme Court were now to question the constitutionality of the [revised Pledge]"). Indeed, the unanimity on this point relative to *Newdow II* is striking.

C

The *Newdow II* majority, then, finds itself caught between a rock and a hard place—the recitation of the Pledge is not a formal religious act, while patriotic invocations of God do not give rise to Establishment Clause violations. It nonetheless manages to skirt these obstacles to reach its indirect coercion analysis. *Newdow II*'s conclusory foray into the social sciences is a case study, an advertisement, for why it is that the Supreme Court has anchored coercion analysis only to those situations where "formal religious exercises" take place in our public schools. The panel majority seeks to protect dissenters at the risk of courting some unpopularity, but this is not the test. "[O]ffense alone does not in every case show a violation . . . . and sometimes to endure social isolation or even anger may be the price of conscience or nonconformity." *Lee*, 505 U.S. at 597-98. The *Newdow II* majority's expansive application of the coercion test is ill-suited to a society as diverse as ours, since almost *every* cultural practice is bound to offend *someone's* sensibilities. In affording Michael Newdow the right to impose his views on others, *Newdow II* affords him a right to be fastidiously intolerant and self-indulgent. In granting him this supposed right, moreover, the two-judge panel majority has not eliminated feelings of discomfort and isolation, it has simply shifted them from one group to another.

Newdow II's psychological ipse dixit is also delivered without reference or regard to our collective experience in the half-century since the passage of the offending statute. In that time, generations of Americans have grown up reciting the Pledge, religious tolerance and diversity has flourished in this country, and we have become a beacon for other nations in this regard. As

Judge Fernandez observes, "it is difficult to detect any signs of incipient theocracy springing up since the Pledge was amended in 1954." *Newdow II* ___ F.3d at ___ n.4 (Fernandez, J., dissenting).

IV

In fairness to the *Newdow II* panel majority, its professed "neutrality" does have some plausible basis in the case law of the Supreme Court, which has undoubtedly constructed a "fractured and incoherent doctrinal path" in the Establishment Clause area, broadly speaking. *Sep. of Church and State Comm.* v. *City of Eugene*, 93 F.3d 617, 622 (9th Cir. 1996) (O'Scannlain, J., concurring). Indeed, its Establishment Clause cases sometimes "more closely resemble ad hoc Delphic pronouncements than models of guiding legal principles." *Ingebretsen* v. *Jackson Pub. Sch. Dist.*, 88 F.3d 274, 282 (5th Cir. 1996) (Jones, J., dissenting from denial of rehearing en banc). Supreme Court Justices themselves have recognized that if some of its reasoning "were to be applied logically, it would lead to the elimination" of many cherished, long-standing practices. *Co. of Allegheny*, 492 U.S. at 674 n.10 (Kennedy, J., dissenting).

With respect to the issue presented in *this* case, however, the Supreme Court has displayed remarkable consistency—patriotic invocations of God simply have no tendency to establish a state religion. Even Justice Brennan, that most stalwart of separationists, recognized that *some* official acknowledgment of God is appropriate "if the government is not to adopt a stilted indifference to the religious life of the people." *Lynch*, 465 U.S. at 714 (Brennan, J., dissenting). The decision reached in *Newdow II* does precisely that: it adopts a

stilted indifference to our past and present realities as a predominantly religious people.

But *Newdow II* goes further, and confers a favored status on atheism in our public life. In a society with a pervasive public sector, our public schools are a most important means for transmitting ideas and values to future generations. The silence the majority commands is *not* neutral—it itself conveys a powerful message, and creates a distorted impression about the place of religion in our national life. The absolute prohibition on any mention of God in our schools creates a bias *against* religion. The panel majority cannot credibly advance the notion that *Newdow II* is neutral with respect to belief versus non-belief; it affirmatively favors the latter to the former. One wonders, then, does atheism become the default religion protected by the Establishment Clause?

In short, a lack of clarity in the Supreme Court's Establishment Clause cases generally does not help to explain or to justify the panel majority's decision with respect to *this* particular issue. Put simply, the panel was asked to decide whether the recitation of the Pledge of Allegiance in public schools amounted to a government establishment of religion. The answer to that question is clearly, obviously, no. We made a grave error in failing to take *Newdow I* en banc, and we have failed to correct that error ourselves. Now we have *Newdow II*. Perhaps the Supreme Court will have the opportunity to correct the error for us. I must respectfully dissent from the order denying reconsideration en banc.

McKEOWN, Circuit Judge, with whom HAWKINS, THOMAS, and RAWLINSON, Circuit Judges, join, dissenting from the denial of rehearing en banc:

The recitation of the Pledge of Allegiance by school children presents a constitutional question of exceptional importance that merits reconsideration by the en banc court. *See* Fed. R. App. P. 35(a)(2) (en banc hearing appropriate when "the proceeding involves a question of exceptional importance"). Although not every case of exceptional importance can or should be reheard en banc, this is a case that should be reheard. I respectfully dissent from the court's decision to deny rehearing en banc.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-16423

MICHAEL A. NEWDOW, PLAINTIFF-APPELLANT

v.

U.S. CONGRESS; UNITED STATES OF AMERICA; GEORGE W. BUSH,* PRESIDENT OF THE UNITED STATES; STATE OF CALIFORNIA; ELK GROVE UNIFIED SCHOOL DISTRICT; DAVID W. GORDON, SUPERINTENDENT EGUSD; SACRAMENTO CITY UNIFIED SCHOOL DISTRICT; JIM SWEENEY, SUPERINTENDENT SCUSD, DEFENDANTS-APPELLEES

Dec. 4, 2002

ORDER

Before: GOODWIN, REINHARDT and FERNANDEZ, Circuit Judges.

Order by Judge GOODWIN; Concurrence by Judge FERNANDEZ.

GOODWIN, Circuit Judge.

After we issued our June 26, 2002 opinion in this case, Sandra Banning, the mother of Michael Newdow's

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* George W. Bush is substituted for his predecessor, William Jefferson Clinton, as President of the United States. Fed. R. App. P. 43(c)(2).

daughter, filed a motion for leave to intervene, in order to, *inter alia*, challenge Newdow's standing to maintain this action. Banning attached to her motion as an exhibit a copy of a February 6, 2002 California Superior Court custody order. That order awarded Banning "sole legal custody" of the child. We have carefully reconsidered the question of Newdow's Article III standing in light of this custody order and affirm our holding that he has standing as a parent to continue to pursue his claim in federal court.

I. FACTUAL AND PROCEDURAL BACKGROUND

When this case first reached us from the district court, no legal custody question or order had been disclosed to the federal courts. Newdow had alleged in the district court that he was the father, and had custody of the minor child. The record now indicates that Newdow and Banning formed a family consisting of an unmarried man, an unmarried woman, and their biological minor child, who lived together part of the time and lived in separate homes in Florida and California, from time to time, with informal visiting arrangements. This informal arrangement apparently was not subject to any custody order until February 6, 2002, after Newdow had appealed from the dismissal of the action he had commenced in federal district court to challenge on Establishment Clause grounds the practice of reciting the pledge of allegiance in the public elementary school his child attends.

On February 6, the California Superior Court entered an order containing the following language:

> The child's mother, Ms. Banning, to have *sole* legal custody as to the rights and responsibilities to make decisions relating to the health, education and

> welfare of [the child]. Specifically, both parents shall consult with one another on substantial decisions relating to non-emergency major medical care, dental, optometry, psychological and educational needs of [the child]. If mutual agreement is not reached in the above, then Ms. Banning may exercise legal control of [the child] that is not specifically prohibited or inconsistent with the physical custody order. The father shall have access to all of [the child's] school and medical records.

Thereafter, Newdow, alleging "changed circumstances," filed a motion in the Superior Court for a modification of the custody order, seeking, *inter alia*, joint legal custody with Banning of their child.

On September 25, 2002, the Superior Court (Judge Mize) entered an *in personam* order enjoining Newdow from pleading his daughter as an unnamed party or representing her as a "next friend" in this lawsuit. The United States promptly filed a motion, which we have granted, to enlarge the record to include the state court transcript of the September 25 hearing before Judge Mize. That transcript contemplates a full trial in the future on Newdow's motion for modification of the February 6 custody order.

Judge Mize appropriately reserved to this court, however, the question of Newdow's Article III standing in federal court. Newdow no longer claims to represent his child, but asserts that he retains standing in his own right as a parent to challenge alleged unconstitutional state action affecting his child while she attends public school in the Elk Grove Unified School District (EGUSD).

II. DISCUSSION

Our original opinion in this case holds that a parent has Article III standing to challenge on Establishment Clause grounds state action affecting his child in public school. *See Newdow* v. *U.S. Congress*, 292 F.3d 597, 602 (9th Cir. 2002) (citing *Doe* v. *Madison Sch. Dist. No. 321*, 177 F.3d 789, 795 (9th Cir. 1999) (en banc) and *Grove* v. *Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir. 1985)). Banning's motion for leave to intervene presents a question of first impression in this Circuit which we are required to consider, even though raised for the first time on appeal. *See United States* v. *Viltrakis*, 108 F.3d 1159, 1160 (9th Cir. 1997) ("[T]he jurisdictional issue of standing can be raised at any time."). Does the grant of sole legal custody to Banning deprive Newdow, as a noncustodial parent, of Article III standing to object to unconstitutional government action affecting his child?

A Seventh Circuit decision, *Navin* v. *Park Ridge School District 64*, 270 F.3d 1147 (7th Cir. 2001) (per curiam), addresses a noncustodial parent's standing to challenge a school's educational plan for his disabled child under the Individuals with Disabilities Education Act (IDEA). Though not controlling, the Seventh Circuit's reasoning in *Navin* illustrates a useful method of analysis for the standing question presented here. The divorce decree in that case had granted the mother sole legal custody of her son. The Illinois Marriage and Dissolution of Marriage Act provided that the legal custodian may determine, absent an agreement by the parties to the contrary, "the child's uprising, including but not limited to, his education, health care and religious training." *See* 750 IL CH § 5/608(a). Contending that tutoring for his dyslexic son was being provided by

a "crossing guard supervisor with no skill (or at least no certification) in educating dyslexic youths," the father in *Navin* had asked for an administrative hearing under the IDEA and filed suit in federal court when the hearing officer terminated the proceeding without addressing the merits. 270 F.3d at 1148. The district court dismissed the father's suit, holding that as a noncustodial parent, he had no standing to challenge action affecting his child in school. *Id.*

The Seventh Circuit held, however, that noncustodial parents do not automatically lack standing under the IDEA. *Id.* at 1149. Instead, the court of appeals explained that whether the noncustodial father in *Navin* had standing depended on the parental rights granted or reserved to him in the divorce decree in light of the mother's assertion of her rights so granted or reserved:

> If the decree had wiped out all of [the noncustodial father's] parental rights, it would have left him with no claim under the IDEA. But this is not what the divorce decree does. The district court did not analyze its language, but it is in the record and shows that [the noncustodial father] retains some important rights, including the opportunity to be informed about and remain involved in the education of his son. If [the father and mother] disagree about educational decisions, then [the mother's] view prevails—unless under state law the school district's view prevails over *either* parent's wishes, and in that event [the father's] rights under the decree to influence the school's choices are even more important.

270 F.3d at 1149-1150 (internal citations omitted) (emphasis in original). Accordingly, the Seventh Circuit

remanded the case to the district court, instructing it to "decide whether [the father's] claims [were] incompatible, *not* with the divorce decree itself, but with [the mother's] use of her rights under the decree." *Navin*, 270 F.3d at 1149-1150 (emphasis in original).

Navin's general approach to the problem of noncustodial parental standing is sound. We hold that a noncustodial parent, who retains some parental rights, may have standing to maintain a federal lawsuit to the extent that his assertion of retained parental rights under state law is not legally incompatible with the custodial parent's assertion of rights. This holding assumes, of course, that the noncustodial parent can establish an injury in fact that is fairly traceable to the challenged action, and it is likely that the injury will be redressed by a favorable decision. *See Friends of the Earth* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). Having already held that Newdow satisfies those Article III requirements, *see Newdow*, 292 F.3d at 603-05, we now turn to the question of whether he retains standing despite Banning's opposition as sole legal custodian to his maintaining this lawsuit.[1]

The February 6 custody order governing Banning's and Newdow's respective parental decision-making power remains operative and plainly does not strip Newdow of all of his parental rights. Rather, that order establishes that Newdow retains rights with respect to his daughter's education and general welfare. He has

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[1] It is unclear to us exactly what relief Banning seeks. In her motion papers, at times Banning appears to object only to Newdow's appearance as "next friend" of their daughter. At other places, she also seems to object to Newdow's standing in his own right.

the right to consult with Banning regarding substantial non-emergency decisions (with Banning having ultimate decision-making power), as well as the right to inspect his daughter's school and medical records regardless of Banning's position.

California state courts have recognized that noncustodial parents maintain the right to expose and educate their children to their individual religious views, even if those religious views contradict those of the custodial parent or offend her.[2] *See Murga* v. *Petersen*, 103 Cal. App.3d 498, 163 Cal. Rptr. 79 (1980). As the *Murga* court noted, it was following the "*majority of American jurisdictions*" in refusing to place restraints on a noncustodial parent who wished to expose his children to his particular religious views, absent a clear, affirmative showing that these religious activities would be harmful to the children. *Id.* at 504-05, 163 Cal. Rptr. 79 (emphasis added). The principle of nonintervention, the court noted, "reflects the protected nature of religious activities and expressions of belief, as well as the proscription against preferring one religion over another." *Id.* at 505, 163 Cal. Rptr. 79. It is not only the court that must not interfere; even more so, the state and federal government may not seek to indoctrinate the child with their religious views, particularly over the objection of *either* parent.

Murga was the basis for a later California state court decision, *In re Mentry*, 142 Cal. App.3d 260, 190 Cal. Rptr. 843 (1983), that reversed a restraining order against a noncustodial father that forbade him from

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[2] As the Supreme Court has acknowledged, recognized religions exist that do not teach a belief in God, e.g., secular humanism. *Torcaso* v. *Watkins*, 367 U.S. 488, 495 n.11, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961).

engaging his children in any religious activities other than those approved by the custodial mother. The *Mentry* court stated that "the concept of family privacy embodies not simply a policy of *minimum state intervention* but also a presumption of parental autonomy. Many of the purposes served by this presumption become *more important after dissolution* [of the marriage or relationship] than they were before." 142 Cal. App.3d at 268, 190 Cal. Rptr. 843 (emphasis added). The type of "*minimum state* intervention" discussed in *Mentry* surely does not permit official state indoctrination of an impressionable child on a daily basis with an official view of religion contrary to the express wishes of *either* a custodial or noncustodial parent. We conclude that Newdow retains sufficient parental rights to support his standing here.

The next question, then, is whether Banning's status as sole legal custodian empowers her to employ state law to defeat Newdow's standing. "'Sole legal custody' means that one parent shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child." Cal. Fam. Code § 3006. Thus, Newdow cannot disrupt Banning's choice of schools for their daughter. And, as Judge Mize's September 25 order makes clear, Newdow cannot name his daughter as a party to a lawsuit against Banning's wishes.

Judge Mize, however, appropriately declined to rule on whether Newdow has standing in his own right as a parent to maintain this case in federal court. We hold that Banning has no power, even as sole legal custodian, to insist that her child be subjected to unconstitutional state action. Newdow's assertion of his retained parental rights in this case, therefore, simply cannot be

legally incompatible with any power Banning may hold pursuant to the custody order. Further, Ms. Banning may not consent to unconstitutional government action in derogation of Newdow's rights or waive Newdow's right to enforce his constitutional interests. Neither Banning's personal opinion regarding the Constitution nor her state court award of legal custody is determinative of Newdow's legal rights to protect *his own* interests.

When school teachers lead a recitation of the Pledge of Allegiance according to school district policy, they present a message by *the state* endorsing not just religion generally, but a monotheistic religion organized "under God." While Newdow cannot expect the entire community surrounding his daughter to participate in, let alone agree with, his choice of atheism and his daughter's exposure to his views, he can expect to be free from the government's endorsing a particular view of religion and unconstitutionally indoctrinating his impressionable young daughter on a daily basis in that official view. The pledge to a nation "under God," with its imprimatur of governmental sanction, provides the message to Newdow's young daughter not only that non-believers, or believers in non-Judeo-Christian religions, are outsiders, but more specifically that her *father's* beliefs are those of an outsider, and necessarily inferior to what she is exposed to in the classroom. Just as the foundational principle of the Freedom of Speech Clause in the First Amendment tolerates unpopular and even despised ideas, *see Cohen* v. *California*, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971), so does the principle underlying the Establishment Clause pro-

tect unpopular and despised minorities from government sponsored religious orthodoxy tied to government services. *See Santa Fe Independent Sch. Dist.* v. *Doe*, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000); *Lee* v. *Weisman*, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992). Accordingly, we affirm Newdow's standing to challenge on Establishment Clause grounds the EGUSD's practice of requiring his daughter to attend daily recitations of the 1954 version of the Pledge of Allegiance.

Banning's motion for leave to intervene is DENIED because she has no protectable interest at stake in this action.

FERNANDEZ, Circuit Judge, concurring:

I concur in the order, but write separately to emphasize that in this order we decide that Newdow's legal status under California law vis-à-vis his daughter does not deprive him of standing. Despite the order's allusions to the merits of the controversy, we decide nothing but that narrow standing issue.[1] Leastwise, I join nothing other than the narrow decision that the orders of the California courts have not deprived Newdow of standing.

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[1] For my view on the merits question, see *Newdow* v. *U.S. Congress*, 292 F.3d 597, 612-15 (9th Cir. 2002) (Fernandez, J., concurring and dissenting.)

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-16423

MICHAEL A. NEWDOW, PLAINTIFF-APPELLANT

v.

U.S. CONGRESS; UNITED STATES OF AMERICA; GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES; STATE OF CALIFORNIA; ELK GROVE UNIFIED SCHOOL DISTRICT; DAVID W. GORDON, SUPERINTENDENT EGUSD; SACRAMENTO CITY UNIFIED SCHOOL DISTRICT; JIM SWEENEY, SUPERINTENDENT SCUSD, DEFENDANTS-APPELLEES

Dec. 4, 2002

ORDER

Before: GOODWIN, REINHARDT and FERNANDEZ, Circuit Judges.

FERNANDEZ, Circuit Judge.

Once we ruled on the merits of this case,[1] the United States Senate sought to intervene as a party and in that capacity to file a petition for rehearing and a petition for rehearing en banc. We deny the Motion to Intervene, but note our willingness to accept the petition and accompanying brief as an amicus brief, if the Senate

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[1] *Newdow* v. *U.S. Congress*, 292 F.3d 597 (9th Cir. 2002).

consents to the latter use of its filing. Because of the respect that we owe to and have for the Senate, we are constrained to explain the reasons for our denial of intervention.

Initially, of course, we lay aside the usual intervention rule. *See* Fed. R. Civ. P. 24(a)(2). This case is more in line with Fed. R. Civ. P. 24(a)(1), which allows intervention as of right "when a statute of the United States confers an unconditional right to intervene." There is a special statute that applies to this motion. As relevant here, the statute first provides that the Senate Legal Counsel shall intervene or appear as amicus "when directed to do so by a resolution adopted by the Senate." 2 U.S.C. § 288b(c). There was a resolution here. *See* Senate Resolution 292, 107th Cong., 2d Sess. (2002), 148 Cong. Rec. S6105-06 (2002). The statute goes on to provide that Counsel shall intervene upon appropriate direction when "the powers and responsibilities of Congress under the Constitution of the United States are placed in issue," but should only do so if there is standing. *See* 2 U.S.C. § 288e(a). It then states:

> Permission to intervene as a party or to appear as amicus curiae under § 288e of this title shall be of right and may be denied by a court only upon an express finding that such intervention or appearance is untimely and would significantly delay the pending action or that standing to intervene has not been established under section 2 of article III of the Constitution of the United States.

2 U.S.C. § 288*l* (a).

Because the Senate waited until we had already ruled on the merits of this case on appeal, it would be

possible, even accurate, to hold that the attempt to intervene is untimely. However, under the circumstances we are unable to hold that the proposed intervention to seek rehearing or en banc review would "significantly delay" the action. Especially is that true when, as here, some of the current parties to the action have themselves already sought both types of review. We must, therefore, turn our attention to the second exception in § 288*l*(a)—does the Senate have constitutional standing? To put it more precisely: does the Senate have constitutional standing to intervene in every case where the constitutionality of a United States statute is challenged? Because we determine that the answer to that question is no and because there is nothing about the statute at hand that would distinguish it from other statutes, the Senate does not have standing in this case.

Let it first be said that the issue is not whether the United States has standing to appear in support of the constitutionality of the statute in question. Nobody doubts that it does. *See* 28 U.S.C. § 2403(a). In fact, in this case it did appear for "the Congress of the United States; the United States of America; and William J. Clinton, President of the United States."[2] The question is whether the Senate, as a separate part of the government, has standing to intervene to support statutes on its own behalf, and not really as a representative of the United States itself. We need not, and do not,

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[2] Perhaps it should also be recognized that "the three branches are but 'coordinate parts of one government,'" and in that sense there can be no doubt that the legislature is already represented here anyway. *See United States* v. *Providence Journal Co.*, 485 U.S. 693, 701, 108 S. Ct. 1502, 1507, 99 L. Ed. 2d 785 (1988) (internal citation omitted).

decide whether Congress could designate the Senate Legal Counsel, upon a separate resolution of the Senate alone, to appear as the defender of all statutes on behalf of the United States itself. A law of that type might well have its own constitutional problems; it might even trench on the prerogatives of the executive branch of the United States, which has the authority to execute the laws of this country. *See* U.S. Const. art. II, § 3. At any rate, that has not occurred here. As already stated, a separate statute confers *that* authority upon the executive branch, and here the Senate seeks to appear to represent itself alone.

As the intervention statute at hand expressly recognizes, the Senate must show that it does have constitutional standing to intervene. That means at the very least that it must show that it has "suffered an 'injury in fact'—an invasion of a legally protected interest which is . . . concrete and particularized." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed.2d 351 (1992); *see also Raines* v. *Byrd*, 521 U.S. 811, 818-20, 117 S. Ct. 2312, 2317-18, 138 L. Ed. 2d 849 (1997). That concrete and particularized harm is lacking in this case because no harm beyond frustration of a general desire to see the law enforced as written has been shown here.

In so stating, we are aware that there have been a number of cases wherein Senate intervention has been allowed without any particular remark or detailed consideration. *See, e.g., INS* v. *Chadha*, 462 U.S. 919, 930 n.5, 103 S. Ct. 2764, 2773 n.5, 77 L. Ed. 2d 317 (1983); *Lear Siegler, Inc., Energy Prod. Div.* v. *Lehman*, 893 F.2d 205, 206 (9th Cir. 1990) (en banc); *In re Benny*, 812 F.2d 1133, 1135 (9th Cir. 1987); *see also Bowsher* v. *Synar*, 478 U.S. 714, 106 S. Ct. 3181, 92 L.

Ed. 2d 583 (1986). But those cases are not really apposite because they were of a character that directly (particularly) implicated the authority of Congress within our scheme of government, and the scope and reach of its ability to allocate power among the three branches. Thus, *Chadha*, 462 U.S. at 956-58, 103 S. Ct. at 2787, is a case that dealt with individual houses of Congress assuming the authority to review and veto executive decisions regarding the deportation of aliens. It, thus, implicated separation of powers doctrine and the whole scheme of our government. *Lear Siegler* dealt with whether Congress could allocate to a legislative agent—The Comptroller General—the authority to delay the procurement actions of the executive branch of the government. *See Lear Siegler, Inc., Energy Prod. Div.* v. *Lehman*, 842 F.2d 1102, 1105-06 (9th Cir. 1988), *vacated on other grounds*, *Lear Siegler*, 893 F.2d at 208; *see also Bowsher*, 478 U.S. at 717, 106 S. Ct. at 3183. Finally, in *Benny*, 812 F.2d at 1141-42, the issue was whether Congress had the authority to prospectively extend the term of office of bankruptcy judges. In other words, in each of these cases the courts were dealing with a statute addressing legislative action regarding allocation of authority within the government, as opposed to action applying that authority to the behavior of the citizenry in general. The issues were the kind that intimately affected Congress's own place within our constitutional scheme.

More closely on point are cases which speak to the standing of legislators to bring actions, where their institutional power as members of the legislature is not being challenged. In *Raines*, 521 U.S. at 814-16, 117 S. Ct. at 2315-16, for example, a number of members of the Senate and House of Representatives sued pursuant to

a provision of the Line Item Veto Act which declared that any member of Congress could challenge the Act. *See*, 2 U.S.C. § 692(a)(1). The Court declared that they had "alleged no injury to themselves as individuals . . ., the institutional injury they allege is wholly abstract and widely dispersed . . ., and their attempt to litigate this dispute at this time and in this form is contrary to historical experience." *Id.* at 829, 117 S. Ct. at 2322. The Court did point out that they did not actually represent their separate houses of Congress and those houses actually opposed them, but did not indicate precisely how that affected their standing.[3] *Id.* The Court distinguished an earlier case wherein state legislators were accorded standing because their votes would have been deprived of all validity if an allegedly improper person were able to vote. *See Coleman* v. *Miller*, 307 U.S. 433, 438, 59 S.Ct. 972, 975, 83 L. Ed. 1385 (1939). Thus, at least as to individual legislators, there is no standing unless their own institutional position, as opposed to their position as a member of the body politic, is affected.

The District of Columbia Circuit has followed the same approach. In 1977, a congressman sued the director of the Central Intelligence Agency partly on the basis that when that agency misused its budget, his vote as a congressman was impaired. *See Harrington* v. *Bush*, 553 F.2d 190, 204 (D.C. Cir. 1977). The court found that he lacked standing, and that a contrary rule would amount to giving him "a roving commission to obtain judicial relief under most circumstances." *Id.* at

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[3] Of course, the Line Item Veto Act dealt with the allocation of power between the legislative and executive branches. *See* 2 U.S.C. §§ 691-692. However, the Senate was content to appear as *amicus curiae*. *Raines*, 521 U.S. at 813 n.*, 117 S. Ct. 2312.

214. Along the way, the court noted that "his specific rights, interests and prerogatives lie in the power to make laws. As we have noted, this power has not been invaded, diminished, diluted, or injured by the challenged actions in this case." *Id.* at 213. A like result was reached when a member of Congress sued to prevent alleged misuse of federal funds by a national commission. *See Hansen* v. *Nat'l Comm'n. on the Observance of Int'l Women's Year*, 628 F.2d 533 (9th Cir. 1980). We said: "The injury alleged by appellant is an injury which he suffers along with all other citizens of the United States. He has not presented any facts which show he has sustained or is imminently in danger of sustaining an actual personal injury." *Id.* at 534. Thus, he had no standing. *Id.* And, when faced with a claim by congressmen that the military was using its budget to finance combat in other countries, despite laws prohibiting that, the Fourth Circuit had this to say: "Once a bill has become law, however, their interest is indistinguishable from that of any other citizen. They cannot claim dilution of their legislative voting power because the legislation they favored became law." *Harrington* v. *Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975). The court was no more impressed with the claim that their legislative duties would somehow be affected. *See id.* Other cases have sounded the same note. *See, e.g., Baird* v. *Norton*, 266 F.3d 408, 411-12 (6th Cir. 2001); *Chenoweth* v. *Clinton*, 181 F.3d 112, 112-13, 117 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1012, 120 S. Ct. 1286, 146 L. Ed. 2d 233 (2000); *Daughtrey* v. *Carter*, 584 F.2d 1050, 1057-58 (D.C. Cir. 1978); *Metcalf* v. *Nat'l Petroleum Council*, 553 F.2d 176, 187-89 (D.C. Cir. 1977).

These observations also apply to the Senate as a whole, when it seeks to have a roving commission to enter every case involving the constitutionality of statutes it has enacted. In those instances, its own "powers and responsibilities" are not really under attack. Once the Senate has approved a proposed bill, the House of Representatives agrees, and the President has signed the measure, it becomes public law. A public law, after enactment, is not the Senate's any more than it is the law of any other citizen or group of citizens in the United States. It is a law of the United States of America, and the government is already represented in this case by the Attorney General. Of course, every time a statute is not followed or is declared unconstitutional, the votes of legislators are mooted and the power of the legislature is circumscribed in a sense, but that is no more than a facet of the generalized harm that occurs to the government as a whole. By the same token, the President's signing of the legislation is also nullified, judges, who might have felt otherwise, are bound by the decision, and citizens who relied upon or desired to have the law enforced are disappointed.[4] Moreover, if the separate houses of Congress have standing, a challenger of a law would have to contend with fighting the United States itself, and separately defending himself against the Senate and the House of

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[4] All of this is underscored by the Senate's suggestion that it should have standing because it opens its daily sessions with the Pledge of Allegiance. That, of course, is an assertion that could be made by countless other organizations, governmental and otherwise, not to mention thousands of United States citizens.

Representatives, each of which would be able to appear as a separate litigating party in the case.[5]

Therefore, the motion of the Senate to intervene is DENIED. However, if the Senate wishes to have us deem its proposed brief to be an amicus brief and to consider it on that basis, we will do that. It should inform us of its desire in that regard within 30 days after the filing of this order.

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[5] In principle, he might also have to separately contend against the President, whose ability to effectively sign the law in question can be said to have been affected. We see little other than mischief arising from a system of intervention as unregulated as that. Constitutional standing doctrine is the apotropaion for that threatened malady. It must be applied here.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-16423

MICHAEL A. NEWDOW, PLAINTIFF-APPELLANT

v.

U.S. CONGRESS; UNITED STATES OF AMERICA; GEORGE W. BUSH,* PRESIDENT OF THE UNITED STATES; STATE OF CALIFORNIA; ELK GROVE, UNIFIED SCHOOL DISTRICT; DAVID W. GORDON, SUPERINTENDENT EGUSD; SACRAMENTO CITY UNIFIED SCHOOL DISTRICT; JIM SWEENEY, SUPERINTENDENT SCUSD, DEFENDANTS-APPELLEES

Dec. 4, 2002

ORDER

Before: GOODWIN, REINHARDT and FERNANDEZ, Circuit Judges.

Sandra Banning's motion for leave to intervene is DENIED.

The State of California's purported appearance in this appeal is rejected, and its purported petition for

* George W. Bush is substituted for his predecessor, William Jefferson Clinton, as President of the United States. Fed. R. App. P. 43(c)(2).

rehearing with suggestion for rehearing en banc, filed July 25, 2002, is ORDERED STRICKEN.

Newdow's motion for judicial notice is DENIED.

Newdow's motion for sanctions against Banning's attorneys is DENIED.

Sandra Banning's application for leave to file sur-response to Newdow's motion for sanctions IS DENIED.

Newdow's motion to file response to federal and state defendants' supplemental briefs is DENIED.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV S-00-0495 MLS PAN PS

REV. DR. MICHAEL A. NEWDOW, PLAINTIFF

v.

THE CONGRESS OF THE UNITED STATES,
ET AL., DEFENDANTS

[Filed July 21, 2000]

ORDER

This matter was referred to the Honorable Peter A. Nowinski, United States Magistrate Judge, pursuant to 28 U.S.C. §§ 636, et seq., and Local Rule 72-302. On May 25, 2000, Judge Nowinski recommended that plaintiff's complaint be dismissed. Plaintiff has filed objections to the findings and recommendation.

The court has reviewed the file and finds the findings and recommendation to be supported by the record and by the magistrate judge's analysis. Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendation filed May 25, 2000, are adopted in full; and

2. Plaintiff's complaint is dismissed.

DATE: July 21, 2000.

/s/ illegible signature
UNITED STATES DISTRICT
JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

CIV S-00-0495 MLS PAN PS

REV. DR. MICHAEL A. NEWDOW, PLAINTIFF

v.

THE CONGRESS OF THE UNITED STATES,
ET AL., DEFENDANTS

[Filed: May 25, 2000]

FINDINGS AND RECOMMENDATION

On March 8, 2000, plaintiff filed a complaint alleging defendants Elk Grove School District and Sacramento City Unified School District violate the Establishment Clause of the First Amendment by requiring teachers [to] lead morning classes in recitation of the pledge of allegiance. Defendant school districts move to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

The only federal Court of Appeal directly to address this issue held that schools may lead the pledge of allegiance without violating the First Amendment so long as pupils are not compelled to participate, because the ceremonial reference to God in the pledge does not convey endorsement of particular religious beliefs. *Sherman* v. *Community Consolidated School District*, 980 F.2d 437, 442-448 (11th Cir. 1992). While the

Supreme Court has not directly addressed the issue, it has noted that its "previous opinions have considered in dicta the motto ['In God We Trust'] and the pledge [of allegiance], characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." *County of Allegheny* v. *American Civil Liberties Union*, 492 U.S. 573, 602-03 (1989); *see also id.* at 625 (O'Connor, J., concurring); *Lynch* v. *Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring); *id.* at 716-17 (Brennan, J., dissenting); *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 303 (1963) (Brennan, J., concurring); *Engel* v. *Vitale*, 370 U.S. 421, 449-50 (1962) (Stewart, J., dissenting). Two Courts of Appeal have stated, also in dicta, that the pledge is not an endorsement of religion. *See Chandler* v. *James*, 180 F.3d 1254, 1262 (11th Cir. 1999); *Separation of Church and State Committee* v. *City of Eugene*, 93 F.3d 617, 622 (9th Cir. 1996).

The Seventh Circuit's decision in *Sherman* and the statements in dicta noted above, while not binding on this court, are persuasive and directly on point. Whether the court employs the test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), or the more recent endorsement test, *see Allegheny*, *supra*, 492 U.S. at 593-594, the Pledge does not violate the Establishment Clause of the First Amendment. Accordingly, I recommend plaintiff's complaint be dismissed.

Dated: May 25, 2000.

/s/ illegible signature
PETER A. NOWINSKI
United States Magistrate
Judge

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 4 of Title 4 U.S.C. provides:

Pledge of allegiance to the flag; manner of delivery

The Pledge of Allegiance to the Flag, "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.", should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute.

Supreme Court, U.S.
FILED
JUN 27 2003
OFFICE OF THE CLERK

Nos. 02-1574 and 02-1624

IN THE

Supreme Court of the United States

THE UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL A. NEWDOW, *et al.*,

Respondents.

ELK GROVE UNIFIED SCHOOL DISTRICT and
DAVID W. GORDON, Superintendent, EGUSD,

Petitioners,

v.

MICHAEL A. NEWDOW,

Respondent.

ON PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MICHAEL A. NEWDOW

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QUESTIONS PRESENTED

(1) Whether the inclusion of the phrase "under God" in the Pledge of Allegiance to the United States Flag violates the Establishment Clause of the First Amendment.

(2) Whether a parent who shares the joint physical custody, but has been deprived of the legal custody, of his child has Article III standing to challenge the daily inculcation of disputed religious dogma when that inculcation is perpetrated by his child's public school teachers.

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I. IS THE ESTABLISHMENT CLAUSE VIOLATED?

As explained in his Petition for Certiorari, Newdow joins with the United States and the EGUSD in requesting that the Court accept this case for review. A grant of certiorari is appropriate because (a) there is a conflict among the circuits, and (b) this case involves a matter of national importance.

Newdow, of course, disagrees with these two defendants over what the proper outcome should be. He believes the text of the First Amendment is quite clear, and that "no law respecting an establishment of religion" means just that. The suggestion that this magnificent phrase was designed with an exemption in mind for laws concerning supreme beings is offensive to the very notion of religious freedom, and testimony to the need "to take alarm at the first experiment on our liberties."[1]

Especially disputed is the claim that there are "repeated opinions of this Court and of the individual Justices consistently explaining that the Pledge of Allegiance . . . do[es] not violate the Establishment Clause." Petition of the United States, at 14.[2] The reality is that there are no such opinions at all. On the contrary, when one looks at the principled dicta that concern the Establishment Clause, the exact opposite is true. For instance, in just one appendix to his Original Complaint, Newdow supplied

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1. Madison's Memorial and Remonstrance against Religious Assessments, (As provided in *Everson v. Board of Education*, 330 U.S. 1, 65 (1947)).

2. Citations to the Appendix refer to the Appendix provided by the United States of America in its Petition for Certiorari to this Court (Docket #02-1574).

two hundred separate dicta, any one of which — if applied to the words, "under God," in the Pledge — would mandate the invalidation of that phrase. Original Complaint, Appendix G. The only statements that in any way bolster the government's contention merely state that we have a Pledge that contains religious words, offering no valid justification at all for that circumstance.

Even the "best" dictum that can be found doesn't come close to the task. Justice Blackmun's brief mention that

> Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief.

Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 602-603 (1989), was obviously written in response to Justice Kennedy's appropriate realization that:

> it borders on sophistry to suggest that the "'reasonable'" atheist would not feel less than a "'full membe[r] of the political community'" every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.

Id., at 673 (Kennedy, J., dissenting). Having been in the minority five years earlier in *Lynch v. Donnelly*, 465 U.S. 668 (1984), Justice Blackmun obviously desired to maintain a plurality in *Allegheny* (which was a highly fractured "consensus" that consisted of five separate opinions, which, all told, evoked ten

different coalitions of justices). Certainly, his other dicta in *Allegheny*, such as:

> "[T]his Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine." 492 U.S. at 590;
>
> "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" 492 U.S. at 593-594 (citation omitted);
>
> "[W]hen evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether 'the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.'" 492 U.S. at 597 (citation omitted);
>
> "[T]his kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes." 492 U.S. at 601 (n. 51);
>
> "[W]e have held [the Establishment Clause] to mean no official preference even for religion over nonreligion." 492 U.S. at 605;

> "[T]he bedrock Establishment Clause principle [is] that, regardless of history, government may not demonstrate a preference for a particular faith." 492 U.S. at 605;
>
> "[T]he Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths." 492 U.S. at 610;
>
> "[T]here is no orthodoxy on religious matters in the secular state." 492 U.S. at 611;
>
> "[T]he availability or unavailability of secular alternatives is an obvious factor to be considered in deciding whether the government's use of a religious symbol amounts to an endorsement of religious faith." 492 U.S. at 618 (n. 67); and
>
> "[G]overnment may not engage in a practice that has the effect of promoting or endorsing religious beliefs." 492 U.S. at 621

are hardly consistent with the idea that he would have upheld the constitutionality of the Pledge.

That he specifically noted that the previous considerations of the Motto and the Pledge were "in dicta" also suggests that he was unconvinced that either was constitutional. As Justice Scalia has pointed out, the Court maintains a "customary refusal to be bound by dicta." *U.S. Bancorp Mortg. Co. v. Bonner Mall Pshp.*, 513 U.S. 18, 24 (1994), and the use of the phrase "in dicta" seems — if anything — to be a marker for the author's

disputation of the given claim. For instance, after Chief Justice Rehnquist wrote that, "We stated, in dicta, that . . ." in *United States v. Felix*, 503 U.S. 378, 389 (1992), he ruled contrary to what the dicta implied. Justice Thomas, in just the past year, has twice done the same. *See Hope v. Pelzer*, 536 U.S. 730, 762 (2002) and *Miller-El v. Cockrell*, 537 U.S. 322, __, 123 S. Ct. 1029, 1050 (2003).

The truth of the matter is that this Court has produced a mountain of pronouncements which — without exception — reveal that the principles underlying the Establishment Clause are incompatible with the continued presence of the religious words, "under God," in the Pledge. Each of the current Supreme Court Justices — like all those who have spoken previously on the Religion Clauses — has clearly enunciated ideals that reveal the constitutional infirmity of the Act of 1954:

Chief Justice Rehnquist:

> [A]lthough the . . . statute as a whole would be enacted to serve a secular legislative purpose, the proviso would clearly serve only a religious purpose.[3]

Justice Stevens:

> The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority. For whenever the State itself speaks on a religious subject, one of the questions that we must ask is "whether the

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3. *Thomas v. Review Board, Ind. Empl. Sec. Div.*, 450 U.S. 707, 726 (1981) (Rehnquist, J., dissenting).

> government intends to convey a message of endorsement or disapproval of religion."[4]

Justice O'Connor:

> [W]hen [government] acts it should do so without endorsing a particular religious belief or practice that all citizens do not share.[5]

Justice Scalia:

> Where we have tested for endorsement of religion, the subject of the test was either expression *by the government itself*, . . . or else government action alleged to *discriminate in favor* of private religious expression or activity.[6]

Justice Kennedy:

> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.[7]

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4. *Wallace v. Jaffree*, 472 U.S. 38, 60-61 (1985) (citation and footnotes omitted).

5. *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

6. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995) (emphases in original).

7. *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

Justice Souter:

> [C]ivil power must be exercised in a manner neutral to religion.[8]

Justice Thomas:

> [T]he question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action.[9]

Justice Ginsburg:

> If the aim of the Establishment Clause is genuinely to uncouple government from church, a State may not permit . . . a display of this character.[10]

Justice Breyer:

> [A]voiding religiously based social conflict — remains of great concern.[11]

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8. *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687, 704 (1994).

9. *Mitchell v. Helms*, 530 U.S. 793, 809 (2000).

10. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 817 (1995) (Ginsburg, J., dissenting) (reference omitted).

11. *Zelman v. Simmons-Harris*, 536 U.S. 639, 723 (2002) (Breyer, J., dissenting).

The Court should grant certiorari in this case, and loudly, clearly, and unanimously, proclaim that in this land of religious liberty, the government will never take a position — one way or the other — regarding disputed religious dogma.

II. STANDING FOR NON-CUSTODIAL PARENTS

Newdow is a devoted parent who shares joint physical custody of his daughter. Although he has been deprived of the legal custody of this child,[12] his interests and rights in directing her education have not been abrogated to anywhere near a degree sufficient to deprive him of standing as a parent in this case.

All three judges on the Ninth Circuit panel noted that the custody order "establishes that Newdow retains rights with respect to his daughter's education and general welfare." App., at 94a. The panel also recognized that, in California, decisions regarding religious upbringing are particularly reserved to both parents. Thus, it found that "the state and federal government may not seek to indoctrinate the child with their religious views, particularly over the objection of *either* parent." *Id.*, at 95a (emphasis in original).

---

12. It is not within the province of this Response to detail the circumstances that led to this loss of legal custody. Suffice it to say that Newdow — an incredibly outstanding parent — was accused of "child neglect" for letting his daughter (while he dutifully stood by at the entrance) use an airport women's room. It was his challenge to the "expert psychologist" who made this ludicrous and irresponsible claim — and the animosity that the challenge engendered — that resulted in this restriction of his fundamental constitutional right of parenthood. The matter is currently before the California Court of Appeal for the Third District (consolidated case Nos. C040840, C042384).

The important observation that:

> The pledge to a nation "under God," with its imprimatur of governmental sanction, provides the message to Newdow's young daughter not only that non-believers, or believers in non-Judeo-Christian religions, are outsiders, but more specifically that her *father's* beliefs are those of an outsider, and necessarily inferior to what she is exposed to in the classroom.

Id., at 95a (emphasis in original) was also cogently made by the Ninth Circuit. This direct harm to Newdow, himself, certainly gives rise to standing.

One other essential point is that Newdow has not only the right, but the obligation to protect his child from harm.[13] To require him to go to the Superior Court to obtain permission to do this is but a further unjustified intrusion upon his parenthood. Even accepting that the State may constitutionally forbid Newdow from naming his child in the litigation,[14] he certainly has the right to vindicate his own interest in safeguarding her welfare.

As the Ninth Circuit unanimously concluded, parents like Newdow — who are intimately involved in their child's upbringing and who share in the decision-making about their lives — have

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13. "[P]arents during a child's minority have the legal right **(and obligation)** to act on behalf of their child to protect their child's rights and interests." *American Academy of Pediatrics v. Lundgren*, 16 Cal. 4th 307, 335 [940 P.2d 797, 66 Cal. Rptr. 2d 210] (1997) (emphasis added).

14. This contention is also being challenged in the California Court of Appeal for the Third District (consolidated case Nos. C040840, C042384).

standing to protect those children against potential harms.[15] Newdow believes (as this Court has repeatedly made clear) that there is harm to children when public school teachers espouse religious dogma. In this case, the harm is especially acute because the dogma being espoused is of a kind he finds offensive. To Newdow, his child is being wronged, and to suggest that he suffers no "injury-in-fact" when harm comes to this person he places above all else in his life is simply incorrect.

One last point concerns the fact of the mother's different religious views. This, actually, increases the harm to Newdow in regard to this case. Newdow is perfectly willing — actually glad — to see his child exposed to differing religious views at home. However, the government is now weighing in upon that parental difference of opinion, thus altering the dynamics of the family's religious debate. That, by itself, is an injury-in-fact that gives Newdow standing.

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15. As an analogy, consider a hypothetical where a military base was polluting the environment with lead dust. If the mother believed the need for national defense outweighed the developmental health risks to their growing child, would Newdow be precluded from seeking redress in the courts? Is the government suggesting that having a child with a preventable neurological impairment is no longer an "injury-in-fact" because of some limitations it has placed upon the parent's legal rights?

CONCLUSION

The petition for a writ of certiorari should be granted, and the purity of the Establishment Clause upheld. Devoted parents who are deprived of their legal custody should not be further injured by losing the right to advocate for their children in order to protect them from harm. Because a harm to a child is a harm to a parent, certiorari should be denied on that issue.

Respectfully submitted,

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No. 02-1574

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL A. NEWDOW, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 02-1574

UNITED STATES OF AMERICA, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. The government's petition seeks this Court's review of the Ninth Circuit's holding that the inclusion of the phrase "under God" in the national Pledge of Allegiance violates the Establishment Clause when voluntarily recited by public school students.[1] The petition explained that the court of appeals' decision squarely conflicts with two decisions of this Court stating that the Pledge of Allegiance is constitutional (Pet. 14-17), numerous opinions of individual Justices expressing that same view (Pet. 17-19), and the Seventh Circuit's decision in *Sherman* v. *Community Con-*

[1] Since the filing of the government's petition, the citation for the court of appeals' amended opinion on rehearing, and the accompanying opinions on the denial of rehearing en banc, have been altered. They both are now reported at 328 F.3d 466.

solidated School District 21, 980 F.2d 437 (1992), cert. denied, 508 U.S. 950 (1993), which rejected a similar challenge to the Pledge (see Pet. 24). The Petition also explained (Pet. 25) the great importance of the question presented, due to the large number of schools in all 50 States, as well as federally operated schools, that engage in daily voluntary recitations of the Pledge by students, and the overriding importance of having a unitary content for a *national* Pledge of Allegiance. The decision clearly merits this Court's review.

As evidenced by its own petition for a writ of certiorari seeking review and reversal of the same Ninth Circuit judgment, the Elk Grove Unified School District and its superintendent also share the view that an exercise of this Court's certiorari jurisdiction is warranted. See Pet. at i, 20-21, *Elk Grove Unified Sch. Dist.* v. *Newdow*, No. 02-1624 (filed Apr. 30, 2003).

Respondent Newdow now agrees (Br. in Opp. 1) that certiorari should be granted in this case, acknowledging the direct circuit conflict created by the Ninth Circuit's decision and the national importance of the question presented.[2] Newdow, nevertheless, insists that the decision below is wholly consistent with opinions of this Court and of individual Justices, to the point of asserting that there are "no * * * opinions at all" explaining that the Pledge of Allegiance is consistent with the Establishment Clause. Br. in Opp. 1. The reality is otherwise.

In *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), the Court said in no uncertain or qualified terms that "examples

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[2] Respondent Newdow, in fact, has filed his own petition for a writ of certiorari seeking review of the Ninth Circuit's judgment in this case. Pet. at i, 24, *Newdow* v. *United States Congress*, No. 03-7 (filed June 26, 2003).

of reference to our religious heritage are found * * * in the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag," which "is recited by many thousands of public school children—and adults—every year," *id.* at 676, and that such official acknowledgments of our Nation's religious heritage do not "establish[] a religion or religious faith, or tend[] to do so," *id.* at 678.

Again, in *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989), the Court specifically reaffirmed *Lynch*'s approval of the reference to God in the Pledge, noting that all the Justices in *Lynch* viewed the Pledge as "consistent with the proposition that government may not communicate an endorsement of religious belief." *Id.* at 602-603.

The Court's analysis of the Pledge and similar official acknowledgments of religion in *Lynch* and *County of Allegheny*, moreover, were not dicta as Newdow asserts (Br. in Opp. 1-2), but instead were components of the "well-established rationale upon which the Court based the results of its * * * decisions." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 66-67 (1996). The Court's discussions of the Pledge articulated the constitutional baseline for permissible official acknowledgments of religion under the Establishment Clause against which the governmental practices at issue in each of those cases were then measured. Indeed, for decades, the Court and individual Justices "have grounded [their] decisions in the oft-repeated understanding," *id.* at 67, that the Pledge of Allegiance, and similar references, are constitutional. See Pet. 16-19. The opinions of the Court in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963), and *Engel* v. *Vitale*, 370 U.S. 421 (1962), repeatedly affirmed the constitutionality of official

references to the Nation's religious heritage and "the many manifestations in our public life of belief in God," *Engel*, 370 U.S. at 435 n.21, that form "part of the fabric of our society," *Marsh*, 463 U.S. at 792, and that acknowledge that "our national life reflects a religious people," *Abington Township*, 374 U.S. at 213.

The Court's cases thus establish as settled law that official acknowledgments in public life of the Nation's religious heritage and character do not constitute a prohibited endorsement of religion and do not otherwise violate the Establishment Clause. "[P]ublic acknowledgment of the [Nation's] religious heritage long officially recognized by the three constitutional branches of government" renders "farfetched" "[a]ny notion that these symbols pose a real danger of establishment of a state church." *Lynch*, 465 U.S. at 686; see also Pet. 14-21 (discussing cases). As pointedly explained by the Court in *County of Allegheny*, the inclusion of the phrase "under God" in the Pledge is one such permissible official acknowledgment of the role of religion in the Nation's culture and history, and it is "consistent with the proposition that government may not communicate an endorsement of religious belief." 492 U.S. at 602-603. The Ninth Circuit's decision is flatly irreconcilable with those opinions.

Newdow counters with a collection of other quotes from Establishment Clause decisions. Br. in Opp. 2-7. The short answer is that the authorities the government's petition cites specifically identify and endorse the Pledge of Allegiance by name. Newdow's excerpts do not. In the Establishment Clause area in particular, where context is crucial, see *Lynch*, 465 U.S. at 678, general reflections pulled out of context from off-point cases do not undermine the force of authoritative statements directed specifically to the question at issue.

Beyond that, Newdow's supposition that his non-specific quotations render the Pledge of Allegiance unconstitutional (Br. in Opp. 2) fails to come to grips with this Court's longstanding refusal to construe the Establishment Clause in a manner that "press[es] the concept of separation of Church and State to * * * extremes" and that thus would condemn as unconstitutional the "references to the Almighty that run through our laws, our public rituals, [and] our ceremonies." *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952); see also *Abington Township*, 374 U.S. at 306 (Goldberg, J., concurring) ("untutored devotion to the concept of neutrality can lead to * * * a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it."). Indeed, it is precisely because isolated, broad statements of Establishment Clause principles would produce absurd results if applied to their logical extremes in disparate contexts that the Court has used common and unobjectionable practices, like the reference to God in the Pledge of Allegiance, as consistent analytical guideposts in Establishment Clause cases.

In sum, the Establishment Clause has never been held to compel the type of official disregard of or stilted indifference to the Nation's undeniable religious heritage that the Ninth Circuit and respondent propound. The Ninth Circuit's decision is so manifestly contrary to precedent that not only is further review warranted, but the Court may also wish to consider summary reversal.

2. Newdow opposes certiorari on the standing question raised by the government's petition (see Pet. i, 25-30), on the ground that he retains "interests and rights

in directing [his daughter's] education" (Br. in Opp. 8). The question of Newdow's standing to vindicate alleged harm to a daughter over whom he exercises no legal custody, however, is a jurisdictional question that is necessarily antecedent to the Court's consideration of the merits of the constitutional question. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

Amicus Americans United for Separation of Church and State separately argues that the standing question is so infused with questions of state-law as to warrant denial of the petition or certification of some unidentified state-law question to the California Supreme Court. Amicus Br. 7-9.[3] There is no dispute, however, as to the scope of Newdow's rights under state law. Newdow concedes that the child's mother, not he, has "*sole* legal custody" of the daughter. Pet. App. 90a. Nor is there any dispute that the mother's legal custody gives her final decisionmaking control over the "health, education and welfare" of the child. *Id.* at 90a-91a; Cal. Family Code § 3006 (West 1994) ("sole legal custody" means "that one parent shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child"). State law is also clear that the mother alone can "direct [the daughter's] activities and make decisions regarding [her] * * * religion." *Burge* v. *City & County of San Francisco*, 262 P.2d 6, 12 (Cal. 1953). In light of Newdow's legal inability to prevent the daughter's exposure

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[3] Amicus's assertion (Br. 11) that Newdow's alleged injury derives "from [his daughter] being coerced to participate in reciting the Pledge" at school misreads the record. See Pet. App. 28a ("Newdow does not allege that his daughter's teacher or school district requires his daughter to participate in reciting the Pledge.").

to religion if the mother decides to take her daughter to church or to enroll her in parochial school, it is unclear how Newdow can nevertheless claim a legally cognizable injury from the daughter's exposure to the Pledge when the mother decides the daughter should attend a public school where it is recited. See generally Pet. 29-30.

While state law affords Newdow the right to "expose" his daughter to his atheistic views, Pet. App. 95a, it is a distinct question of *federal* law whether that limited state-law interest vests him with Article III standing to challenge an educational practice that the custodial mother supports. In amicus's own words (Br. 10), it is the "Ninth Circuit's understanding of the implications of pertinent California law" for Article III standing for which the government's petition seeks this Court's review. Likewise, Newdow's assertion (Br. in Opp. 9) that he should be able to press this suit in federal court, rather than have "to go to the Superior Court to obtain permission" to challenge an educational practice endorsed by the custodial mother, raises precisely the *Rooker-Feldman* concerns identified in the government's petition (Pet. 27). See also *Liedel* v. *Juvenile Ct. of Madison County*, 891 F.2d 1542, 1545-1546 (11th Cir. 1990) (the *Rooker-Feldman* doctrine bars a federal court's exercise of jurisdiction over a case involving an ongoing child custody dispute, notwithstanding claimed violations of constitutional rights to due process and privacy).[4]

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[4] Amicus's separate argument that the federal government is not injured by the Ninth Circuit's ruling (Br. 3-5) is meritless. As explained in the government's petition (Pet. 2 n.2, 11, 25), the *national* Pledge of Allegiance has been declared constitutionally unfit for voluntary recitation in public school classrooms; military schools within the Ninth Circuit would be bound by the judgment

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For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the court of appeals' judgment.

THEODORE B. OLSON
Solicitor General

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to alter their present practice of daily voluntary recitation of the Pledge by students and teachers; and the district court judgment affording the United States a complete victory in its defense of the constitutionality of 4 U.S.C. 4 has now been supplanted by a judgment declaring the law unconstitutional as applied in one important context. Amicus's jurisdictional argument (Br. 5-7) is equally devoid of merit. The United States was made a party-defendant in this litigation, and the Ninth Circuit did not enter a final judgment of dismissal for any of Newdow's claims against the United States. Therefore, unless and until a court dismisses all of Newdow's claims against the United States (as well as the other federal respondents) in their entirety, the United States is entitled to seek review of the court of appeals' adverse judgment. Furthermore, as explained in the United States' petition (Pet. 2), in the unique context of litigation implicating the constitutionality of an Act of Congress, the jurisdictional concerns raised ultimately can have and will have no effect on the United States' status as a party in this case, because the United States government has chosen to make itself a party to defend the constitutionality of federal law on its face and as applied, pursuant to its automatic, statutory right to intervene under 28 U.S.C. 2403. Newdow's broad challenge in his own petition (Pet. at i, 7-23, *Newdow* v. *United Staes Congress*, *supra*) to the Pledge of Allegiance, which names the President and Congress as respondents and which challenges the court of appeals' dismissal of Congress from the case, underscores the federal government's ongoing party status in this litigation.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner,*
v.
MICHAEL A. NEWDOW, ET AL., *Respondents.*

On Petition for A Writ of Certiorari to the
United States Court of Appeals for Ninth Circuit

Brief Amici Curiae of United States Senators Sam Brownback, Saxby Chambliss, John Cornyn, and Lindsey Graham, United States Representatives Robert Aderholt, Todd Akin, Bob Beauprez, Sanford Bishop, Jr., Marsha Blackburn, Roy Blunt, Chris Cannon, Michael Collins, Jo Ann Davis, John Doolittle, Jeff Flake, Trent Franks, Virgil Goode, Jr., Duncan Hunter, Ernest Istook, Jr., Walter Jones, Jr., Ric Keller, Frank Lucas, Donald Manzullo, Jim Marshall, Jeff Miller, C.L. Otter, Charles Pickering, Jr., Joseph Pitts, Jim Ryun, John Shimkus, Mark Souder, John Sullivan, and Dave Weldon, M.D., the American Center for Law and Justice, and One Hundred Fifty-Six Thousand Five Hundred and Ninety-Seven American Citizens Supporting Petitioner

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INTEREST OF AMICI*

Amici, Sam Brownback, Saxby Chambliss, John Cornyn, and Lindsey Graham are members of the United States Senate, and Robert Aderholt, Todd Akin, Bob Beauprez, Sanford Bishop, Jr., Marsha Blackburn, Roy Blunt, Chris Cannon, Michael Collins, Jo Ann Davis, John Doolittle, Jeff Flake, Trent Franks, Virgil Goode, Jr., Duncan Hunter, Ernest Istook, Jr., Walter Jones, Jr., Ric Keller, Frank Lucas, Donald Manzullo, Jim Marshall, Jeff Miller C.L. Otter, Charles Pickering, Jr., Joseph Pitts, Jim Ryun, John Shimkus, Mark Souder, John Sullivan, and Dave Weldon, M.D., are members of the United States House of Representatives currently serving in the One Hundred Eighth Congress.

Amicus, American Center for Law and Justice (ACLJ), is a public interest law firm committed to ensuring the ongoing viability of constitutional freedoms in accordance with principles of justice. Counsel of Record for the ACLJ has presented oral argument in eight cases before this Court. ACLJ attorneys have also participated as amicus curiae in numerous cases before this Court and the lower federal courts.

Amici, 156,597 Americans, are citizens who represent all fifty states. These amici include school-age children, many of whom attend public schools, and desire to recite the Pledge of Allegiance in its entirety.

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* This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, amicus ACLJ discloses that no counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, or its counsel, made a monetary contribution to the preparation of submission of this brief.

Amici urge this Court to grant certiorari in this case because they are convinced that the Ninth Circuit's decision holding the phrase "under God" in the Pledge of Allegiance unconstitutional is profoundly wrong. Recitation of the Pledge of Allegiance in public schools is fully consistent with the Establishment Clause of the First Amendment to the United States Constitution. The words of the Pledge echo the conviction held by the Founders of this Nation that our freedoms come from God. Congress placed the phrase "One Nation Under God" in the Pledge of Allegiance for the express purpose of reaffirming America's unique understanding of this truth, and to distinguish America from atheistic nations who recognize no higher authority than the State. The First Amendment affords atheists complete freedom to disbelieve; it does not compel the federal judiciary to redact religious references in patriotic exercises in order to suit atheistic sensibilities.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted Because This Case Presents a Constitutional Question of Exceptional Importance.

The magnitude of the question presented in this case can hardly be overstated. Although the primary issue is whether the Establishment Clause prohibits public schools from leading students in the voluntary recitation of the Pledge of Allegiance, far more is at stake. The Ninth Circuit's decision renders constitutionally suspect a number of public school practices that traditionally have been considered an important part of American public education.

The first casualty of the Ninth Circuit's decision will be the practice of requiring students to learn and recite passages from many historical documents reflecting the

Nation's religious heritage and character. If a public school district violates the Establishment Clause by requiring students to recite the Pledge of Allegiance, it is difficult to conceive of a rationale by which compelled study or recitation from the Nation's founding documents would not also violate the Constitution. The Mayflower Compact,[1] the Declaration of Independence,[2] and the Gettysburg Address[3]

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[1]The Mayflower Compact, written by William Bradford in 1620, provides:

> We whose names are underwritten, the loyal subjects of our dread sovereign Lord, King James, by *the grace of God*, of Great Britain, France and Ireland king, defender of the faith, etc., having undertaken, *for the glory of God, and advancement of the Christian faith*, and honor of our king and country, a voyage to plant the first colony in the Northern parts of Virginia, do by these presents solemnly and mutually *in the presence of God*, and one of another, covenant and combine ourselves together into a civil body politic, for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute, and frame such just and equal laws, ordinances, acts, constitutions, and offices, from time to time, as shall be thought most meet and convenient for the general good of the colony, unto which we promise all due submission and obedience.

Mayflower Compact, *available at* http://www.project 21.org/MayflowerCompact.html (emphasis added).

[2] The Declaration of Independence recognizes that human liberties are a gift from God: "All men are created equal, that they are endowed by *their Creator* with certain unalienable Rights." *The Declaraction of Independence* para. 2 (U.S. 1776). Jefferson wrote further that the right to "dissolve the political bands" connecting the Colonies to England derives from Natural Law and "*Nature's God*." *Id.* para. 1. The founders also believed that God holds man accountable for his actions as the signers of the Declaration "appeal[] to the *Supreme Judge of the world* to rectify their intentions." *Id.* para. 32.

[3]On November 19, 1863, President Lincoln declared "that this Nation, *under God*, shall have a new birth of freedom--and that Government of

all contain religious references substantiating the fact that Americans are a predominantly "religious people whose institutions presuppose a Supreme Being." *Zorach v. Clausen*, 343 U.S. 306, 313 (1952). *See also Newdow v. United States Congress*, 321 F.3d 772, 778 (9th Cir. 2003) (O'Scannlain, J., Kleinfeld, J., Gould, J., Tallman, J., Rawlinson, J., and Clifton, J., dissenting from denial of rehearing en banc). Indeed, the references to deity in these historical documents are presumably even more problematic according to the Ninth Circuit's reasoning because they proclaim not only God's existence but specific dogma about God – He is involved in the affairs of men; He holds men accountable for their actions; and He is the Author of human liberty. Additionally, while students may be exempted from reciting the Pledge of Allegiance, *see Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), student recitations of passages from historical documents are often treated as a mandatory part of an American history or civics class, not subject to individual exemptions.

Equally disturbing is the likelihood that the Ninth Circuit's decision will eventually foreclose the Nation's school districts from teaching students to sing and appreciate the Nation's patriotic music as well as a vast universe of classical music with religious themes. Students might learn about the Nation's founding documents without being required to recite them. Public school music programs cannot exist, however, without student performance. Thus, patriotic anthems, such as "*America the Beautiful*" and "*God Bless America,*" will become taboo because they cannot realistically be learned unless they are sung. Such musical treasures as Bach's choral arrangements and African-American spirituals will also become constitutionally

---

the people, by the people, for the people, shall not perish from the earth." President Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863).

suspect, at least as a part of public school music curricula. According to the Ninth Circuit's logic, if a group of students sing "*God Bless America,*" the Establishment Clause is violated because an atheistic student might *feel coerced* to sing along (and indeed may well be coerced inasmuch as music teachers are not constitutionally compelled to exempt students from singing with the class).

The Ninth Circuit's effort to distinguish the Pledge of Allegiance from religious references in historical documents and music fails. The court reasoned that the Pledge of Allegiance is "performative," whereas the Declaration of Independence and patriotic music are not. *Newdow v. United States Congress*, No. 00-16423, 2002 U.S. App. Lexis 28040, at *23 (9th Cir. June 26, 2002). The court's logic ignores completely the fact that students may refuse to "perform" the Pledge of Allegiance but they do not have the same constitutional right to refuse to sing "*America the Beautiful*" in music class. Worse, however, is the court's implicit assumption that when students recite the Pledge of Allegiance, they mean what they say, but when they sing patriotic music or recite historical documents, they are merely mouthing words without mental affirmation of the contents. *Id.* According to the Ninth Circuit then, constitutional violations hinge on the subjective mental state of the student speakers or singers.

Undoubtedly, teachers who take seriously their responsibility for inculcating the civic values enshrined in the Nation's foundational documents would be dismayed to learn that the Constitution now compels them to ensure that students who recite passages from these documents do not actually believe in the values reflected, lest some objecting student feel mentally coerced. Similarly, the Ninth Circuit's logic would impel public school music directors to ensure that members of the school chorale do not actually agree

with the words of Bach's "*Jesu, Joy of Man's Desiring,*" lest a Hindu soprano be offended.

If allowed to stand, the Ninth Circuit's decision will threaten a sort of Orwellian reformation of public school curricula by censoring American history and excluding much that is valuable in the world of choral music.

II. Certiorari Should Be Granted Because The Ninth Circuit's Decision Is Irreconcilable With What This Court Has Said About The Pledge Of Allegiance.

Although purporting to give "due deference," *Newdow*, 2002 U.S. App. Lexis 28040, at *22, to this Court's numerous statements about the constitutionality of the Pledge of Allegiance, the Ninth Circuit's decision is patently inconsistent with those statements. In every instance in which the Court or individual Justices have addressed patriotic exercises with religious references, including the Pledge of Allegiance, they have concluded unequivocally that those references pose no Establishment Clause problems. No Member of the Court, past or current, has suggested otherwise. To the contrary, recognizing that certain of its precedents may create the impression that patriotic exercises with religious references would be constitutionally suspect, the Court has taken pains to assure that such is not the case.

The Ninth Circuit's analysis was flawed from the start. Claiming reliance on this Court's school prayer cases, including *Lee v. Weisman*, 505 U.S. 577 (1992), the Ninth Circuit lumped together for constitutional analysis religious exercises and patriotic exercises. In every school prayer case, however, this Court consistently has distinguished between religious exercises, such as prayer and Bible

reading, and patriotic exercises with religious references. In *Engel v. Vitale*, 370 U.S. 421 (1962), which struck down New York State's law requiring school officials to open the school day with prayer, the Court explained:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned *religious exercise* that the State of New York has sponsored in this instance.

Id. at 435, n.21.

Just one year later, in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), Justice Goldberg distinguished mandatory Bible reading in public schools from patriotic exercises with religious references:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great

> consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

Id. at 308 (Goldberg, J., concurring).

Justice Brennan expressly opined in *Schempp* that "reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact." *Id.* at 304 (Brennan, J., concurring).

In *Lee v. Weisman,* 505 U.S. 577 (1992), a decision built in large part on *Engel*, *see* 505 U.S. at 590, 592, the Court reaffirmed the distinction it drew in *Engel* between religious exercises such as state-composed prayers and patriotic exercises with religious references:

> We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity. But, by any reading of our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause. The *prayer exercises* in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit *religious*

> *exercise* at an event of singular importance to every student, one the objecting student had no real alternative to avoid.

Id. at 597-98 (emphasis added). Quoting with approval the above-cited language from Justice Goldberg's concurrence in *Schempp*, the Court continued:

> Our society would be less than true to its heritage if it lacked abiding concern for the values of its young people, and we acknowledge the profound belief of adherents to many faiths that there must be a place in the student's life for precepts of a morality higher even than the law we today enforce. We express no hostility to those aspirations, nor would our oath permit us to do so. *A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.* We recognize that, at graduation time and *throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.*

Id. (citations omitted) (emphasis added).

As in *Engel* and *Schempp,* the deciding factor in *Lee* was that school officials sponsored a religious exercise – prayer. *Lee* gives no support to the Ninth Circuit's conclusion that the voluntary recitation of the Pledge of Allegiance violates the Establishment Clause because it contains the phrase "One Nation Under God." The Ninth Circuit's ruling that voluntary patriotic exercises are

converted into religious exercises if they contain religious references flatly contradicts the Court's assurances to the contrary in *Engel*, *Schempp*, and *Lee*. By ignoring the Court's consistent distinction between religious exercises in public schools, which raise Establishment Clause concerns, and patriotic exercises with religious references, which do not, the Ninth Circuit misapplied *Lee*.

In addition to misreading the Court's school prayer cases, the Ninth Circuit also refused to heed the unequivocal import of Supreme Court statements addressing the Pledge of Allegiance in other contexts. Every time the Court or an individual Justice has mentioned the Pledge of Allegiance, whether in majority, concurring, or dissenting opinions, the conclusion has been that it poses no Establishment Clause problems.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court recognized the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life." 465 U.S. at 674. "Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Id.* at 675. The Court listed many examples of our "government's acknowledgment of our religious heritage," and included among those examples Congress' addition of the words "under God" in the Pledge of Allegiance in 1954. *Id.* at 676-77.

> [E]xamples of reference to our religious heritage are found in the statutorily prescribed national motto "In God We Trust," 36 U.S.C. § 186, which Congress and the President mandated for our currency, see 31 U.S.C. § 5112(d)(1) (1982 ed.), and in the language "one nation under god," as part of the Pledge

> of Allegiance to the American flag. That pledge is recited by many thousands of public school children – and adults – every year.

Id. at 676-77.

In a concurring opinion, Justice O'Connor stated that governmental acknowledgements of religion such as the National Motto "In God We Trust" "serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Id.* at 693 (O'Connor, J., concurring).

A year later in *Wallace v. Jaffree*, 472 U.S. 38 (1985), Justice O'Connor stated explicitly that the words "under God" in the Pledge do not violate the Constitution because they "serve as an acknowledgment of religion with 'the legitimate secular purpose of solemnizing public occasions, and expressing confidence in the future.'" 472 U.S. at 78 n.5 (O'Connor, J., concurring) (quoting *Lynch*, 465 U.S. at 693) (O'Connor, J., concurring)).

In *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989), Justices Blackmun, Marshall, Brennan and Stevens stated:

> Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief. We need not return to the subject of 'ceremonial deism,'. . . because there is an obvious distinction

> between creche displays and references to God in the motto and the pledge.

492 U.S. at 602-603.

The three dissenting Justices in *Allegheny*, Justices Kennedy, Rehnquist and Scalia, agreed that striking down national traditions such as the Pledge would be a disturbing departure from the Court's precedents upholding the constitutionality of government practices recognizing the nation's religious heritage. The dissent pointed out that the Establishment Clause does not

> require a relentless extirpation of all contact between government and religion. . . . Government policies of accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage. . . . "[W]e must be careful to avoid the hazards of placing too much weight on a few words or phrases of the Court," and so we have "declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history."

Id. at 657 (Kennedy, J., concurring) (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 670-71 (1970)).

In sum, every Member of the current Court that has expressed any opinion about the constitutionality of the Pledge of Allegiance has stated that it poses no Establishment Clause problems. The Ninth Circuit's insistence, therefore, that the Pledge of Allegiance becomes unconstitutional when school children recite it is insupportable.

III. This Court Should Grant Review To Resolve The Split In The Circuits Created By The Ninth Circuit's Decision.

In *Sherman v. Community Consolidated School District*, 980 F.2d 437 (7th Cir. 1992), the Seventh Circuit rejected an Establishment Clause challenge to a public school's policy of having school children recite the Pledge of Allegiance. Unlike the Ninth Circuit, the court acknowledged its responsibility to follow the Supreme Court's clear direction: "[i]f the [Supreme] Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so." 980 F.2d at 448.

Additionally, the Ninth Circuit's decision conflicts in principle with the decisions of two other Courts of Appeal holding that the performance of religious music by public school students is consistent with the Establishment Clause. *See Bauchman v. W. High Sch.*, 132 F.3d 542 (10th Cir. 1997); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) (Establishment Clause did not forbid school choir from using a religious piece as its theme song).

CONCLUSION

For the foregoing reasons, Amici respectfully urge this Court to grant Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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BRIEF

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Nos. 02-1574 & 02-1624

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER,
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MICHAEL A. NEWDOW, ET AL., RESPONDENTS

ELK GROVE UNIFIED SCHOOL DISTRICT, AND DAVID W. GORDON, SUPERINTENDENT, EGUSD, PETITIONERS,
v.
MICHAEL A. NEWDOW, RESPONDENT

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR UNITED STATES SENATE AS AMICUS CURIAE SUPPORTING PETITIONERS

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BRIEF FOR UNITED STATES SENATE AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICUS

This case presents the question whether a school district's policy of teacher-led, voluntary recitation of the Pledge of Allegiance to the Flag violates the Establishment Clause of the First Amendment to the Constitution. Within hours of the Ninth Circuit's invalidation of the policy at issue, the Senate, by a vote of 99-0, reaffirmed its conviction that the Pledge, which has been codified in its present form since 1954, "is not an unconstitutional expression of patriotism." S. Res. 292, 107th Cong. (2002), 148 Cong. Rec. S6105-06 (daily ed. June 26, 2002). Relying upon the many public acknowledgments of our religious heritage, Congress subsequently reenacted the

Pledge in its identical language, Pub. L. No. 107-293, § 2(a), 116 Stat. 2057, 2060 (2002), 4 U.S.C.A. § 4 (West Supp. 2003) (historical notes), and reaffirmed its belief that the reference to God in the Pledge is "clearly consistent with the text and intent of the Constitution." *Id.*, § 1(9). The United States Senate, therefore, has a strong interest in the proper disposition of this case and appears as amicus curiae to present its view that the Pledge fully comports with the commands of the Constitution.[1]

SUMMARY OF ARGUMENT

For 111 years, our Nation's public schools have instilled the virtue of patriotism in our children through daily recitation of the Pledge of Allegiance to the Flag. The divided decision below wrongly bans that practice in the nine Western states. Review of that decision by this Court is warranted because it is contrary to the unbroken tradition of public acknowledgments of the role of religion in our Nation's history and because it misunderstands the constitutional distinction between patriotism and prayer in public school. The guidance of this Court is further needed because the decision below squarely conflicts with the decision of the Seventh Circuit in *Sherman v. Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992), and invalidates the recitation of a patriotic creed codified, and recently reaffirmed, by Acts of Congress.

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[1] This appearance as amicus is pursuant to 2 U.S.C. § 288e(a), which authorizes the Senate to appear "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." *See* S. Res. 71, 108th Cong. (2003), 149 Cong. Rec. S3204 (daily ed. Mar. 5, 2003) (directing Senate appearance in this Court.) Permission to appear as amicus is "of right" and may be denied only for untimeliness. 2 U.S.C. § 288*l*(a). Pursuant to 2 U.S.C. § 288e(c), this submission presents a constitutional defense of the Pledge of Allegiance.

ARGUMENT

I. REVIEW IS WARRANTED BECAUSE THE PLEDGE'S ACKNOWLEDGMENT OF THE HISTORICAL ROLE OF RELIGION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

Review is warranted because the two-judge majority below wrongly invalidated as a "religious act" the voluntary recitation of the Pledge of Allegiance in public school. Appendix to United States Petition for a Writ of Certiorari (hereinafter "U.S. Pet. App.") at 17a. America's National Pledge is our most widely recognized statement of patriotism, unity, and devotion to country. It is recited literally millions of times each day in our schools. Because the voluntary recitation of the Pledge is a patriotic practice that acknowledges the historical role of religion in America, it does not violate the Establishment Clause of the First Amendment to the Constitution.

A. The Pledge Is a Patriotic Exercise That Acknowledges the Historical Role of Religion in America

The Pledge is a constitutional expression of patriotism that recognizes the role of religion in our Nation's history. It was originally written by Francis Bellamy in 1892 in connection with a national public school celebration of the 400th anniversary of the discovery of America. John W. Baer, *The Pledge of Allegiance: A Centennial History 1892-1992*, at 1-2 (1992). In its original form, the Pledge read: "I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all." *Id.* at 3.

The Pledge, Bellamy explained, was inspired by themes of unity and patriotism arising out of the Civil War and the founding of our country. A "pledge" of "allegiance" recalled the vows of allegiance recommended by President Lincoln during the Civil War; "and the Republic for which it stands" was a phrase popularized in the 1850's by Senator Daniel Webster; "one nation, indivisible" represented "our struggle for independence and for Indivisibility"; and

"with Liberty and Justice for all" encompassed our basic national ideals. *Id.* at 4, 47-48.

In the 1920's, the words "to my flag and the Republic" were replaced with "to the flag of the United States of America and to the Republic." *Id.* at 57-58. By that time, the Pledge had gained wide popular acceptance across America, fulfilling its author's vision that it become "a creed of unquestionable Americanism." *Id.* at 58-59.

During the Second World War, Congress codified the Pledge among other patriotic practices, *see* Pub. L. No. 623, ch. 435, § 7, 56 Stat. 380 (1942), in order to "emphasize the existing rules and customs pertaining to the display and use of the flag." S. Rep. No. 77-1477, at 1 (1942); H.R. Rep. No. 77-2047, at 1 (1942) (setting forth "uniform guide for the proper use and display of the flag"). Then, in the midst of the Cold War, harkening back to President Lincoln's concluding call in his Gettysburg Address — that "*this nation, under God*, shall have a new birth of freedom" — Congress added the words "under God" after "Nation" to the Pledge. Pub. L. No. 396, ch. 297, 68 Stat. 249 (1954).

The legislative history of the 1954 enactment demonstrates that Congress added "under God" to the Pledge to "recognize the historical fact that our Nation was believed to have been founded 'under God.'" *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 304 (1963) (Brennan, J., concurring). The Senate Report recommending adoption of the amendment stated that "[o]ur forefathers recognized and gave voice to the fundamental truth that a government deriving its powers from the consent of the governed must look to God for divine leadership." S. Rep. No. 83-1287, at 2 (1954). The House Report similarly asserted that:

> Our American Government is founded on the concept of individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with

> certain inalienable rights which no civil authority may usurp.

H.R. Rep. No. 83-1693, at 1-2, *reprinted in* 1954 U.S.C.C.A.N. 2340.

In explaining the amendment, the House Committee on the Judiciary observed that "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." *Id.* at 2. As manifestations of this historical tradition, both committees pointed to the Mayflower Compact, "America's first instrument of government," S. Rep. No. 83-1287, at 2, which "invoked the name of God in the first sentence," *id.*; *see also* H.R. Rep. No. 83-1693, at 2, 1954 U.S.C.C.A.N. at 2340, and the Declaration of Independence, which "no less than four times refer[red] to the existence of the Creator." *Id.*; *see also* S. Rep. No. 83-1287, at 2.

In accordance with the admonition that "each branch of the Government must initially interpret the Constitution" in the performance of its assigned constitutional duties, *United States v. Nixon*, 418 U.S. 683, 703 (1974), the committees of both Houses expressed their considered view that, within the meaning of this Court's precedents, the amendment was "not an act establishing a religion or one interfering with the 'free exercise' of religion." H.R. Rep. No. 83-1693, at 3, 1954 U.S.C.C.A.N. at 2341; S. Rep. No. 83-1287, at 2. Nor did the amendment "violate the right of any person to disbelieve in God or reject the existence of God. The recognition of God in the pledge . . . does not compel any individual to make a positive affirmation in the existence of God in whom one does not believe." *Id.*

The founding documents cited by the committees contain only some of the many "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984). At the inception of the Constitutional Convention, George Washington exhorted the delegates to "raise a

standard to which the wise and the honest can repair; the event," he declared, "is in the hand of God!" Pub. L. No. 107-293, § 1(4), 116 Stat. 2057, 4 U.S.C.A. § 4 (West Supp. 2003) (historical notes). Five weeks later, with Convention delegates "groping . . . in the dark to find political truth," Benjamin Franklin pondered "applying to the Father of lights to illuminate our understandings," famously recalling that, during the Revolutionary War, God had "heard, and . . . graciously answered" the "daily prayer in this room for the divine protection." 1 Max Farrand, *The Records of the Federal Convention of 1787*, at 451 (rev. ed. 1966). The product of the Convention, our Constitution, explicitly references the Deity. *See* U.S. Const. art. VII ("Year of our Lord").

The First Congress not only acknowledged a proper role for religion in public life, but it did so at the very time it drafted the Establishment Clause. Just three days before Congress sent the text of the First Amendment to the states for ratification, it authorized the appointment of legislative chaplains. *Marsh v. Chambers*, 463 U.S. 783, 788 (1983). Also on that day the House of Representatives successfully urged President Washington to institutionalize the colonial practice, which continues to this date, of celebrating "a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God." *Lynch*, 465 U.S. at 675 n.2; Pub. L. No. 107-293, § 1(6), 116 Stat. 2057, 4 U.S.C.A. § 4 (West Supp. 2003) (historical notes). On July 21, 1789, the very day that the First Congress approved the Establishment Clause, it passed the Northwest Ordinance, which declared: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Engel v. Vitale*, 370 U.S. 421, 443 n.9 (1962) (Douglas, J., concurring); Pub. L. No. 107-293, § 1(5), 116 Stat. 2057, 4 U.S.C.A. § 4 (West Supp. 2003) (historical notes).

The public manifestations of our Nation's religious heritage include "an unbroken history of official acknowledg-

ment by all three branches of government." *Lynch*, 465 U.S. at 674. Both Houses of Congress open their daily sessions with prayer and recitation of the Pledge. *See* Senate Rule IV.1(a), *Standing Rules of the Senate*, S. Doc. No. 107-1, at 4 (2002); House Rule XIV.1, *Constitution, Jefferson's Manual, and Rules of the House of Representatives*, H.R. Doc. No. 106-320, at 620 (2001). "Since the days of John Marshall," this Court's crier has opened each day's session by calling out: "God save the United States and this Honorable Court." *Engel*, 370 U.S. at 446 (Stewart, J., dissenting). Every President has asked for divine guidance upon assuming office. *Id.* Upon the conclusion of speeches, including the constitutionally mandated State of the Union address, Presidents commonly ask for God's blessings upon America. S. Rep. No. 83-1287, at 2.

Manifestations of the religious faith of our forebears appear throughout the Nation's Capital. The Senate Chamber is inscribed with the words: "In God We Trust" and the Latin phrase "Annuit Coeptis" or "God has favored our undertakings." S. Doc. No. 82-20, at 27 (1951); Pub. L. No. 107-293, § 1(10), 116 Stat. 2058, 4 U.S.C.A. § 4 (West Supp. 2003) (historical notes). The Main Reading Room of the Library of Congress prominently displays the Biblical quotation: "The heavens declare the Glory of God, and the firmament showeth His handiwork" (Psalms 19:1). John Y. Cole, *On These Walls* 35 (1995). Friezes on the North and South walls of this Court's chamber depict a procession of historical lawgivers including Moses and Confucius. *County of Allegheny v. ACLU*, 492 U.S. 573, 652-53 (1989) (Stevens, J., concurring in part and dissenting in part); http://www.supremecourtus.gov/ about/ north&southwalls.pdf. The Tomb of the Unknown Soldier is engraved with the words: "Here rests in honored glory an American soldier known but to God." http:// www.mdw.army.mil/FS-A04.htm. Multiple references to God appear in inscriptions on our national memorials. *E.g.*, http://www.monticello.org/ reports/ quotes/ memo-

rial.html (Jefferson Memorial); http://www.nps.gov/linc/memorial/ inscript.htm (Lincoln Memorial).

Our National Motto and Anthem, like the Pledge, also manifest our religious origins. In approving the 1954 amendment to the Pledge, Congress recognized that, pursuant to an 1864 authorization, 31 U.S.C. §5112(d)(1), "In God We Trust" had been inscribed upon "billions and billions of coins." S. Rep. No. 83-1287, at 2; H.R. Rep. No. 83-1693, at 2, 1954 U.S.C.C.A.N at 2341. In 1955, Congress added that "avowal of faith," H.R. Rep. 83-1693, at 2, 1954 U.S.C.C.A.N. at 2341, to our paper currency, 31 U.S.C. §5114(b), and, one year later, declared it to be our National Motto. 36 U.S.C. §302; *Engel*, 370 U.S. at 440 n.5 (Douglas, J., concurring). "The Star Spangled Banner," designated our National Anthem in 1931, 36 U.S.C. §301, also invokes the Almighty. *Engel*, 370 U.S. at 440 n.5 (Douglas, J., concurring).

The Pledge is thus one of "countless . . . examples" of entirely legitimate official expressions in public life recognizing our religious heritage. *Id.* at 449-50 (Stewart, J., dissenting). Its recitation in school is no different from "the reading aloud of Lincoln's Gettysburg Address," *Abington*, 374 U.S. at 304 (Brennan, J., concurring), or the fact that "school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being." *Engel*, 370 U.S. at 435 n.21.[2] Given the pervasiveness of such references

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[2] The panel majority below erroneously insists that reading aloud from the Declaration of Independence, or singing the National Anthem, is different from reciting the Pledge because the words "I pledge" render its recitation an affirmation of the speaker's faith, and not merely that of the author or composer at issue. *See* U.S. Pet. App. at 16a (claiming that "'I Pledge' is a performative statement.") The alleged distinction, however, has no foundation in Establishment Clause jurisprudence, and, in fact, does not exist. As Judge O'Scannlain noted in dissenting from the denial of rehearing en banc below, under the flawed reasoning of the panel majority, the Declaration of Independ-

to God in our founding documents, by our Framers, on our government buildings, by all three branches of government, and in our National Anthem and Motto, banning the recitation of the National Pledge in our public schools as a "religious act" "contradicts our 200-year history and tradition of patriotic references to God," U.S. Pet. App. at 81a (O'Scannlain, J., dissenting from denial of reh'g en banc).

B. The Pledge Does Not Violate the Establishment Clause

Our Pledge of Allegiance to the Flag does not even remotely approach the prohibition against an unconstitutional "establishment of religion." U.S. Const. amend. I. The panel majority's conclusion to the contrary reflects a fundamental misunderstanding of the constitutional distinction between prayer and patriotism in public school. That distinction, which is firmly entrenched in this Court's jurisprudence, leaves no doubt that public school children *may* recite the National Pledge for the same reason they *may* sing the National Anthem: such *patriotic* exercises are not *prayers*.

Over the past 40 years, every one of this Court's school prayer decisions has emphasized the fundamentally religious nature of the challenged activity. *See Engel*, 370 U.S. at 424-25, 435 n.21 (stating at outset that it was uncontested that "nature" of state-composed prayer at issue was a "religious activity" and "has always been religious"); *Abington*, 374 U.S. at 223-24 (stating that "pervading religious character" of reading Bible and reciting Lord's Prayer constitutes a "religious exercise"); *see also id.* at 266 ("The religious nature of the exercises here

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ence and National Anthem "would seem to be the better candidate[s] for the chopping block than the Pledge" because they "require [the speaker] to acknowledge [a] *personal* relationship with God." *Id.* at 82a; *see* Declaration of Independence ("*We hold* these truths to be self-evident, that all men are . . . endowed by their Creator"), *reprinted at* 1 U.S.C. XLIII; Star Spangled Banner ("And this be *our* motto: In God is *our trust*"); *see also* U.S. Const. art. VII ("Year of *our Lord*"); America ("My Country 'Tis of Thee") ("Protect us by thy might, Great God, *our King*"!). (Emphases added.)

challenged seems plain.") (Brennan, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 58 (1985) (recognizing "wholly religious character" of Alabama statute motivated entirely by effort to advance prayer in public schools); *Lee v. Weisman*, 505 U.S. 577, 586-88, 598 (1992) (repeatedly describing graduation prayer as an "overt" "formal" and "explicit" "religious exercise"); *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 305-07 (2000) (recognizing "religious content" of "religious messages" in prayers before high school football games).

But "*no court*, state or federal has *ever* held . . . that [this Court's] school prayer cases apply outside a context of state-sanctioned formal religious observances." U.S. Pet. App. at 78a-79a (O'Scannlain, J., dissenting from denial of reh'g en banc). To the contrary, this Court has repeatedly distinguished between lawful *patriotic* practices that acknowledge our religious heritage and unlawful *religious* practices that transgress the prohibition on governmental establishment of religion. In *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), this Court rejected as "extreme" the condemnation of "references to the Almighty that run through our laws, our public rituals, [and] our ceremonies," in upholding a program permitting students to absent themselves from public school in order to receive religious training. The Court reaffirmed the point in *Engel*, stating that the "unquestioned religious exercise" at issue in that case, a public school prayer "beg[ging] th[e] blessings of Almighty God," "*b[ore] no true resemblance*" to "patriotic or ceremonial occasions" referencing the Deity. 370 U.S. at 422, 435 n.21. (Emphasis added.)[3]

Likewise, in *Lynch*, 465 U.S. at 676, this Court identified the Pledge and Motto among examples of lawful

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[3] Furthermore, in *Engel*, as well as in *Abington* and *Lee*, this Court struck down morning and graduation religious exercises without expressing any disapproval of the Pledge, which was also recited by students in all three cases, *Engel*, 370 U.S. at 438 (Douglas, J., concurring); *Abington*, 374 U.S. at 208; *Lee*, 505 U.S. at 583, and which individual Justices specifically distinguished. *See* note 4, *infra*.

"reference[s] to our religious heritage" guiding the conclusion that the nativity scene at issue was constitutionally permissible. And, most recently, in *County of Allegheny*, this Court noted the "obvious distinction" between the unconstitutional religious display in that case and the "references to God in the motto and the pledge." 492 U.S. at 603.[4]

Because of the substantial constitutional difference between prayer and patriotic references to God, voluntary recitation of the Pledge easily satisfies the tests used to identify Establishment Clause violations. The Pledge satisfies the *Lemon* test because it has the secular purposes of, *inter alia*, "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society," *Lynch*, 465

[4] The opinions explaining the views of 15 individual Justices in these cases also distinguish between unconstitutional religious practices and patriotic acknowledgments of our religious heritage. *See Engel*, 370 U.S. at 440 n.5 (Douglas, J., concurring) (recognizing longstanding acceptance of patriotic practices referencing God); *id.* at 449 (Stewart, J., dissenting) (same); *Abington*, 374 U.S. at 280-81, 301 (Brennan, J., concurring) (suggesting recitation of Pledge in lieu of prayer at issue and admonishing that "[a]ny attempt to impose rigid limits upon the mention of God . . . in the classroom would be fraught with dangers"); *id.* at 307-08 (Goldberg, J., concurring) (endorsing passage from Court's opinion in *Engel* distinguishing between patriotic invocations of God and "unquestioned religious exercise[s]"); *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) (endorsing various public references to God as "acknowledgments of religion"); *id.* at 716-17 (Brennan, J., dissenting) (identifying patriotic references to God as legitimate public "practices by which the government has long acknowledged religion"); *Wallace*, 472 U.S. at 78 n.5 (O'Connor, J., concurring) (recognizing propriety of public acknowledgment of God); *id.* at 88 (Burger, C.J., dissenting) (same); *County of Allegheny*, 492 U.S. at 623, 625 (O'Connor, J., concurring) (referencing lawful purposes of "government recognition and acknowledgment of the role of religion in the lives of our citizens"); *id.* at 671-74 & n.10 (Kennedy, J., concurring in part and dissenting in part) (distinguishing patriotic references to God from unconstitutional religious practices); *Lee*, 505 U.S. at 639 (Scalia, J., dissenting) (noting that Court's invalidation of graduation prayer did not extend to practice of reciting Pledge during graduation ceremony).

U.S. at 693 (O'Connor, J., concurring); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); and neither advances religion nor fosters an excessive government entanglement with it. *Lemon*, 403 U.S. at 612-13; *see also* United States Petition for a Writ of Certiorari (hereinafter "U.S. Pet.") at 17-18. The Pledge satisfies the endorsement test because its acknowledgment of our religious heritage is "consistent with the proposition that government may not communicate an *endorsement of religious belief*." *County of Allegheny*, 492 U.S. at 602-03 (emphases added); *see also* U.S. Pet. at 16, 18, 20.

And the Pledge satisfies the coercion test because the voluntary observance of a patriotic practice does not "coerce" children to perform a "formal religious exercise." *Lee*, 505 U.S. at 587. *See* U.S. Pet. at 20, 21; U.S. Pet. App. at 85a. America's public schools "are entitled to hold their causes and values out as worthy subjects of approval and adoption, to persuade even though they cannot compel, and even though those who resist persuasion may feel at odds with those who embrace the values they are taught." *Sherman*, 980 F.2d at 444. Indeed, the "diversity of religious tenets in the United States ensures that *anything* a school teaches will offend the scruples and contradict the principles of some if not many persons." *Id.*

But "offense alone" does not violate the Constitution. *Lee*, 505 U.S. at 597. "If an Establishment Clause violation arose each time a student believed that a school practice either advanced or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a 'curriculum review committee' unto himself or herself." *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1379 (9th Cir. 1994). That, however, is what has occurred here. The objection of one non-custodial parent has "reduce[d] to silence" literally millions of school children "who *want* to pledge allegiance to the flag 'and to the Republic for which it stands.'" *Sherman*, 980 F.2d at 445.

Accordingly, certiorari should be granted to reaffirm the constitutional distinction between patriotism and

prayer and to restore the teacher-led, voluntary recitation of the Pledge in our Nation's public schools.

II. REVIEW IS FURTHER WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE DECISION OF ANOTHER CIRCUIT ON AN ISSUE OF EXCEPTIONAL IMPORTANCE

Review is further warranted because the decision below directly conflicts with the Seventh Circuit's decision in *Sherman* and every other decision addressing the issue.[5] That court, reasoning that "under God" does not "make the Pledge a prayer," 980 F.2d at 445, upheld teacher-led, voluntary recitation of the Pledge in public school. Resolution of this square inter-circuit conflict, acknowledged by the court below, U.S. Pet. App. at 16a-17a, is thus needed to establish a uniform analysis of a national question upon which uniformity is required. We are "*one* nation," with one National Motto, one National Anthem, and, we submit, one National Pledge.

Finally, a definitive ruling on this issue by this Court is necessary because of the exceptional importance of the question presented. The decision below invalidates the teacher-led, voluntary recitation of a patriotic creed codified by an Act of Congress, *see* U.S. Pet. App. at 69a (O'Scannlain, J., dissenting from denial of reh'g en banc) (stating that panel's invalidation of Pledge "necessarily implies" that the 1954 Act is unconstitutional), and in-

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[5] Two district courts, and one state court of last resort, have also rejected constitutional challenges to the voluntary recitation of the Pledge. *See Newdow v. United States*, No. 98-6585 (S.D. Fla. Dec. 1, 1998) (dismissing for lack of standing and on merits), *aff'd*, No. 99-4136 (11th Cir. Jan. 4, 2000) (affirming dismissal for lack of standing); *Smith v. Denny*, 280 F. Supp. 651, 653-54 (E.D. Cal. 1968) (dismissing on merits), *appeal dismissed*, 417 F.2d 614 (9th Cir. 1969); *Lewis v. Allen*, 159 N.Y.S.2d 807 (N.Y. Sup. Ct. 1957), *aff'd*, 207 N.Y.S.2d 862 (3d Dept. 1960), *aff'd*, 14 N.Y.2d 867 (N.Y.), *cert. denied*, 379 U.S. 923 (1964). Three circuits have concluded in dicta that the Pledge is constitutional. *See American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Bd.*, 243 F.3d 289, 301 n.10, 307 (6th Cir. 2001)(en banc); *Murray v. City of Austin, Texas*, 947 F.2d 147, 155 (5th Cir. 1991); *Lanner v. Wimmer*, 662 F.2d 1349, 1354 (10th Cir. 1981).

vites further consideration of whether that law should be struck down on its face. *Id.* at 18a (remanding for consideration of declaratory relief "as to the constitutionality of the 1954 Act"). The importance of this constitutional question thus merits this Court's review.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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Nos. 02–1574 & 02–1624

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL A. NEWDOW, ET AL., RESPONDENTS

ELK GROVE UNIFIED SCHOOL DISTRICT, AND DAVID W. GORDON, SUPERINTENDENT, EGUSD, PETITIONERS

v.

MICHAEL A. NEWDOW, RESPONDENT

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS AMICUS CURIAE SUPPORTING PETITIONERS

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BRIEF FOR THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE AMICUS CURIAE[1]

The Bipartisan Legal Advisory Group of the U.S. House of Representatives respectfully submits this brief as amicus curiae supporting the petitions for a writ of certiorari

[1] All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than the amicus curiae and its counsel has made a monetery contribution to the preparation or submission of this brief.

in this case.[2] The Bipartisan Legal Advisory Group represents the institutional interests of the House in judicial proceedings, and it and its predecessors have often appeared before this Court where such institutional interests were at stake.[3]

When this case was initially filed, Congress (but not the House and Senate individually) was named as a defendant. The Ninth Circuit held that Congress was not a proper defendant because "in light of the Speech or Debate Clause of the Constitution, Art. I, § 6, cl. 1, the federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation." App. to Pet. for Cert. at 5a. However, even though Congress was not a proper defendant, it clearly is appropriate for the House, through its Bipartisan Legal Advisory Group, to appear as amicus curiae before this Court because of the House's strong interest in this case.

The House's interest in this case stems from the unique and vital place of the Pledge of Allegiance in the civic life of this Nation. "The Pledge of Allegiance is a revered expression of patriotism recited by millions of citizens every day. When it is spoken, it instills support for the United States and reflects the love that Americans feel for their country." 148 CONG. REC. H4132 (daily ed. June 27, 2002) (statement of Rep. Kleczka). Indeed, it is almost impossible to overstate the Pledge's importance to the American people for whom it "is not a prayer [or] part of a religious service . . . [but rather] a statement of our commitment as citizens to our great Nation." 148 CONG. REC. H4132 (daily ed. June 27, 2002) (statement of Rep. Shays). Long before this case was filed, the House recognized the significance and vitality of the Pledge by pro-

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[2] The Bipartisan Legal Advisory Group consists of the Speaker of the House, the Majority Leader, the Majority Whip, the Minority Leader and the Minority Whip.

[3] *See, e.g., Raines v. Byrd*, 521 U.S. 811, 818 n.2 (1997); *United States v. Eichman*, 496 U.S. 310, 311 (1990); *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 154 (1989); *Morrison v. Olson*, 487 U.S. 654, 659 (1988).

viding for its recitation near the beginning of each session of the House. *See* Rule XIV.1, Rules of the U.S. House of Representatives (108th Cong.) (third item in "daily order of business" is the "Pledge of Allegiance to the Flag"). More recently, the House adopted, by overwhelming bipartisan majorities, two resolutions condemning the decision below and expressing support for the Pledge as written. *See* H. Res. 459, 107th Cong., 148 CONG. REC. H4125 (daily ed. June 27, 2002) (enacted); H. Res. 132, 108th Cong., 149 CONG. REC. H1976 (daily ed. March 20, 2003) (enacted). In so doing, the House was clearly giving voice to the sentiments of an overwhelming majority of Americans.

For these reasons, it is appropriate for the House, both because of its own institutional interests and as the elective body that most directly represents the views of the people of this Nation, to appear in this case as amicus curiae in support of the petitions for certiorari.[4] Accordingly, the Bipartisan Legal Advisory Group of the House respectfully submits this brief.

SUMMARY OF ARGUMENT

This Court grants writs of certiorari "only for compelling reasons." SUP. CT. R. 10. One such reason is that "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal

[4] We note that this case is not an isolated piece of litigation, but rather is part of an all-out effort by respondent Newdow to eliminate any reference to "God" in our public life. In recent years, he has named Congress as a defendant in three other lawsuits, the first of which challenged references to God in the Pledge and the National Motto, and on U.S. currency; the second of which challenged references to God in congressional resolutions; and the third of which challenges the existence of congressional chaplains. The first two cases have been dismissed (*Newdow v. United States,* No. 98–6585 (S.D. Fla. Dec. 1, 1998), *aff'd,* 207 F.3d 662 (Table) (11th Cir. 2000); *Newdow v. Congress of the United States,* No. S–01–1924 (E.D. Cal. Aug. 8, 2002)), while the third is still pending (*Newdow v. Eagen*, No. 1:02CV01704 (D.D.C. filed Aug. 27, 2002)).

question in a way that conflicts with relevant decisions of this Court." *Id.* at 10(c). Another is that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." *Id.* at 10(a).

Review of the Ninth Circuit's judgment is warranted under these standards for three reasons. First, this matter is one of great importance. Second, the Ninth Circuit's judgment squarely conflicts with the judgment of another United States court of appeals. Third, the Ninth Circuit's judgment conflicts with oft-repeated statements by this Court that the Pledge of Allegiance is the type of government expression of the religious heritage, foundation and character of the Nation that does not offend the Establishment Clause.

ARGUMENT

I. Importance of the Issue Presented

Like the flag itself, the Pledge of Allegiance is an extraordinary and vital expression of our civic unity and, as such, occupies a unique and important place in American life. "Americans have expressed their reverence for the flag of this Nation and all it represents by reciting the Pledge of Allegiance." 145 CONG. REC. S6801 (daily ed. June 9, 1999) (statement of Sen. McConnell). "The Pledge of Allegiance brings together people of different backgrounds in a shared expression of support for our country." 149 CONG. REC. H1980 (daily ed. March 19, 2003) (statement of Rep. Boozman). Each day, the Pledge is recited by literally millions of Americans in schools, civic and political organizations, and legislative assemblies (including the House and Senate) all across the land. *See, e.g.*, 145 CONG. REC. S6801 (daily ed. June 9, 1999) (statement of Sen. McConnell) ("[H]undreds and thousands of civic organizations and schoolchildren have taken time before turning to their work to recite these moving words.").

The history of the Pledge further illustrates its important role in the civic life of the Nation. The initial version of the Pledge was composed for an 1892 national public school Columbus Day celebration of the 400th anniversary of the discovery of America. John W. Baer, *The Pledge of Allegiance: A Centennial History,* 2 (1992). The author, Francis Bellamy, offered the following account of how and why he arrived at the phrase "One Nation, indivisible":

> Now how should the vista be widened so as to teach the national fundamentals? I laid down my pencil and tried to pass our history in review. It took in the sayings of Washington, the arguments on Hamilton, the Webster-Hayne debate, the speeches of Seward and Lincoln, the Civil War. After many attempts all that pictured struggle reduced itself to three words, "One Nation, indivisible." To reach that compact brevity, conveying the facts of a single nationality and of an indivisibility both of States and of common interest, was, as I recall, the most arduous phase of the task, and the discarded experiments at phrasing overflowed the scrap basket.

100 CONG. REC. 7761 (1954) (statement of Rep. Keating, quoting "A brief synopsis of the story of the origin of the pledge taken from the detailed narrative by Francis Bellamy, author of the pledge").

The Pledge underwent a number of alterations until it was officially codified by Congress in June of 1942, in the darkest hours of the Second World War. Pub. L. No. 623, Ch. 435, §7, 56 Stat. 380 (1942). Twelve years later, again at a critical juncture in our Nation's history—this time at the height of the Cold War, amid the tensions and uncertainty created by Stalin's death a year earlier—Congress amended the Pledge by adding the words "under God." Pub. L. No. 396, Ch. 297, 68 Stat. 249 (1954).

The 1954 Congress believed it vital that the Pledge reflect a distinction between the United States and the

communist Soviet Union. In the attempt to distinguish between the two countries, the legislators focused on the belief in God. *See, e.g.*, 100 CONG. REC. 7763 (1954) (statement of Rep. Wolverton) ("[O]ne of the greatest differences between the free world and the Communists[] [is] a belief in God.").

At the same time, in adding the words "under God" to the Pledge, the legislators were acutely aware of the place of those two words in our history. "These two words are . . . taken from the Gettysburg Address, and represent the characteristic feeling of Abraham Lincoln, who towers today in our imaginations as typical of all that is best in America." 100 CONG. REC. 7764 (1954) (statement of Rep. Rodino). Another Member of Congress said:

> I pointed out that this year our country celebrated the 145th anniversary of the birth of Abraham Lincoln. President Lincoln recognized that only under God could this Nation win a new birth of freedom. I would like to quote the last sentence from President Lincoln's Gettysburg Address: "It is rather for us to be dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this *Nation, under God,* shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth."

100 CONG. REC. 7765 (1954) (statement of Rep. Laird) (emphasis added).

The 1954 amendment was strongly supported by the American people. As one Member of Congress noted: "I have a profound interest in this subject matter stemming from the fact that some 2,000 or perhaps 3,000 of my constituents wrote me in support of this joint resolution. Those who wrote me came from all walks of life. Many

were children. It was by far the largest mail that I have received on any subject during the months of the 83d Congress." 100 CONG. REC. 7761 (1954) (statement of Rep. O'Hara).

This intense public interest in and support for the Pledge continues unabated to this day. The Ninth Circuit's ruling in this case produced an immediate national firestorm, and this controversy was reflected in the reaction of Congress. *See, e.g.,* 148 CONG. REC. H4128 (daily ed. June 27, 2002) (statement of Rep. Weldon) ("I believe that today the American people are clearly crying out, 'Overturn this decision.'"). The day after the initial Ninth Circuit ruling was issued, the House adopted a resolution, by a vote of 416 to three, affirming that "the Pledge of Allegiance and similar expressions are not unconstitutional expressions of religious belief." H. Res. 459, 107th Cong., 148 CONG. REC. H4125 (daily ed. June 27, 2002) (enacted). The resolution also urged the Ninth Circuit to "rehear this ruling en banc in order to reverse this constitutionally infirm and historically incorrect ruling." *Id.*[5]

In so doing, the House acknowledged the historical fact that religion has played an undeniable role in the founding and development of the Nation. "As a new nation we claimed our freedom from any monarch in the Declaration of Independence and inherently in the U.S. Constitution because of 'certain [inalienable] rights' guaranteed to us by our Creator." 148 CONG. REC. H4132 (daily ed. June 27, 2002) (statement of Rep. Shays). "President Abraham Lincoln, in his second inaugural address, spoke of God thirteen times, not in an effort to unite church and state but to unite our Nation at the conclusion of one of

[5] The Senate also adopted, by a vote of 99 to zero, a resolution "strongly disapprov[ing] of" the Ninth circuit decision. S. Res. 292, 107th Cong., 148 CONG. REC. S6105 (daily ed. June 26, 2002) (enacted).

the most devastating periods in U.S. history, the War Between the States." *Id.*[6]

On November 13, 2002, Congress acted again to express the Nation's support for the Pledge. By votes of 401 to five in the House and 99 to zero in the Senate, Congress reenacted the Pledge of Allegiance—including the words "under God"—into law. The statute directs that "[i]n codifying this subsection, the Office of Law Revision Counsel shall show in the historical and statutory notes that the 107th Congress reaffirmed the exact language that has appeared in the Pledge for decades." Pub. L. No. 107–293, § 2(b), 116 Stat. 2057 (2002).

Finally, after the Ninth Circuit rejected the petitions for rehearing, the House adopted another resolution, by a vote of 400 to seven, again stating its position that the decision of the Ninth Circuit was erroneous and that the recitation of the Pledge of Allegiance is a "patriotic" act rather than a religious one. H. Res. 132, 108th Cong., 149 CONG. REC. H1976 (daily ed. March 20, 2003) (enacted). The House resolution went on to urge this Court "to correct this constitutionally infirm and historically incorrect holding." *Id.* at H1977.[7]

In determining whether the issue presented for review here is sufficiently important to merit this Court's atten-

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[6] The 1954 Congress explicitly considered the Establishment Clause in its debate on the amendment, and the legislators openly looked to the Supreme Court for guidance.

> The Supreme Court has clearly indicated that the references to the Almightly which run through our laws, our public rituals, and our ceremonies in no way flout the provisions of the first amendment (*Zorach v. Clauson* (343 U.S. 306, 312–313 [(1952)]). In so construing the first amendment, the Court pointed out that, if this recognition of the Almighly was not so, then even a fastidious atheist or agnostic could object to the way in which the Court itself opens each of its sessions, namely, "God save the United States and this Honorable Court" (id., 313).

H. REP. NO. 1693, at 3 (1954).

[7] The Senate also adopted a resolution, by a vote of 94 to zero, "strongly disapprov[ing] of" the decision. S. Res. 71, 108th Cong., 149 CONG. REC. S3076 (daily ed. March 4, 2003).

tion, the Court should also consider that the judgment below puts at issue an Act of Congress. *Cf. United States v. Gainey,* 380 U.S. 63, 65 (1965) (certiorari granted "to review the exercise of the grave power of annulling an Act of Congress"); *United States v. Bajakajian,* 524 U.S. 321, 327 (1998) (certiorari granted because "the Court of Appeals' holding . . . invalidated a portion of an Act of Congress"); *United States v. Edge Broad. Co.,* 509 U.S. 418, 425 (1993) (certiorari granted because "the court below declared a federal statute unconstitutional and applied reasoning that was questionable under [Supreme Court] cases"). The fact that the Ninth Circuit's judgment puts an Act of Congress at issue makes review by this Court especially appropriate.

II. Conflict Between United States Courts of Appeal

This Court's review is also warranted here because "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals." SUP. CT. R. 10(a). Specifically, the Ninth Circuit's judgment directly conflicts with *Sherman v. Cmty. Consol. Sch. Dist. 21,* 980 F.2d 437 (7th Cir. 1992), cert. denied, 508 U.S. 950 (1993), which holds that the Pledge may be recited in public elementary schools without violating the Establishment Clause.

Indeed, the Ninth Circuit itself recognized the inter-circuit conflict it had created. App. to Pet. for Cert. at 16a-17a. *See also* H. Res. 132, 108th Cong., 149 CONG. REC. H1976 (daily ed. March 20, 2003) (enacted) (The Ninth Circuit's judgment "will prohibit the recitation of the pledge at every public school in 9 states, schooling over 9.6 million students"). A situation in which public school students in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, the Northern Mariana Islands, Oregon and Washington may not recite the Pledge, and public school students in Illinois, Indiana and Wisconsin (as well as other states outside the Ninth Circuit) may, is untenable and merits the grant of certiorari by this Court.

III. Conflict With Statements of This Court

Finally, the grant of certiorari is also warranted because the Ninth Circuit's judgment conflicts with relevant decisions of this Court. *See* SUP. CT. R. 10(c). While this Court has never ruled explicitly on the Pledge itself, the Court has repeatedly cited the Pledge as an example of the type of expression that is permissible under Establishment Clause jurisprudence.

In striking down the Pledge, the Ninth Circuit cited *Lynch v. Donnelly,* 465 U.S. 668, 676 (1984). App. to Pet. for Cert. at 38a–39a, 41a–44a. In *Lynch,* however, this Court actually stated that acceptable "examples of reference to our religious heritage are found . . . in the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag," which "is recited by thousands of public school children—and adults—every year." *Lynch,* 465 U.S. at 676. The fact that *Lynch* uses the Pledge as an example of precisely the type of reference to the Nation's religious heritage that does not "establish[] a religion or religious faith," *id.* at 678, highlights the inconsistency of the Ninth Circuit judgment with opinions of this Court.

Similarly, in a case involving the constitutionality of a publicly-displayed creche and menorah, this Court used the Pledge as an example of what the Establishment Clause permits. *County of Allegheny v. ACLU,* 492 U.S. 573, 602–03 (1989). In *Engel v. Vitale,* 370 U.S. 421, 435 n.21 (1962), which held school prayer unconstitutional, this Court stated: "[N]othing in the decision reached here [] is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity." *See also id.* at 449 (Stewart, J., dissenting) (the Pledge, with the words "under God" added, is constitutional).

There are undoubtedly many individuals who wish religion had played no part in the founding and the history of this Nation. The reality, however, is that religion *has*

influenced this country's development, and this historical fact is reflected in various public rituals, symbols and expressions. This Court's case law makes it very clear that the Establishment Clause does not prohibit official government expression of the religious heritage, foundation and character of the United States, and that the Pledge of Allegiance is an example of the sort of expression that is constitutional. In this respect, the Ninth Circuit's judgment departs drastically from prior pronouncements by this Court.

CONCLUSION

For the reasons set forth herein, the Bipartisan Legal Advisory Group of the U.S. House of Representatives respectfully urges that the Court grant the petitions for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL A. NEWDOW, *et al.*

ELK GROVE UNIFIED SCHOOL DISTRICT AND
DAVID W. GORDON, Superintendent,
Petitioners,

v.

MICHAEL A. NEWDOW, *et al.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN LEGION AS *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES' AND ELK GROVE SCHOOL DISTRICT, ET AL.'S PETITIONS FOR WRITS OF CERTIORARI

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BRIEF OF THE AMERICAN LEGION AS *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES' AND ELK GROVE SCHOOL DISTRICT, ET AL.'S PETITIONS FOR WRITS OF CERTIORARI[1]

INTEREST OF THE *AMICUS CURIAE*

The American Legion ("the Legion") is the largest veterans organization in the United States, comprising more than

[1] Pursuant to Supreme Court Rule 37.2(a), *amicus* has received consent to file this brief from counsel for the petitioners and the respondent *pro se*. The original letters of consent have been filed with the Clerk of Court. No part of this brief was authored by a party or counsel for a party, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

2,600,000 current and former members of our armed services, and long has worked to foster patriotism in general and respect for our nation's flag in particular. The Legion was chartered as a corporation in 1919 by Act of Congress. Act of September 16, 1919, ch. 59, 41 Stat. 284 (current version at 36 U.S.C. §§ 21701-21708 (2000)). The Legion's statutory purposes include upholding and defending the Constitution and supporting its members' service to their country. 36 U.S.C. § 21702 (2000).

The Legion has a long-standing interest in the Pledge of Allegiance to the Flag ("Pledge"). The Legion convened the first National Flag Conference in Washington, D.C. in June 1923. At that conference, which was attended by President Harding, the words of the Pledge were changed from, "I pledge allegiance to my Flag . . ." to "I pledge allegiance to the Flag of the United States . . . ." *See* The Flag Code, adopted at the Nat'l Flag Conf., at 4 (Washington D.C., June 14-15, 1923). At a second National Flag Conference the following year, the Director of the Legion's National Americanism Commission, Garland W. Powell, was elected Permanent Chairman of the Conference. At the 1924 Conference, the words of the Pledge were changed from ". . . Flag of the United States" to ". . . Flag of the United States of America . . . ." *See* Summ. of Proceedings of the All Americanism Conf. called by the Nat'l Americanism Comm'n of the American Legion, at 2 (Washington D.C., May 15-17, 1924).

The Legion also was active in securing enactment of the statute here under challenge—the Act of June 14, 1954, Pub. L. No. 396, ch. 297, 68 Stat. 249 ("1954 Act")—which added the words "under God" to the Pledge, 4 U.S.C. § 4 (2000). *See, e.g.*, American Legion, Nat'l Exec. Comm. Res. 72 (May 1954) (supporting inclusion of "under God" in the Pledge). This case, which implicates the constitutionality of the 1954 Act and the Pledge as amended thereby, raises important

issues about our society and our Constitution. Its implications transcend the interests of the parties and are of great importance to the Legion and its members.

There is no religious test for Legion membership. *See* 36 U.S.C. § 21703 (2000) (establishing honorable service in the armed forces during any listed period of hostilities as membership requirement). Nor has the Legion polled its members as to their religious beliefs. In all likelihood, though, some of the Legion's more than 2.6 million members do not believe in a single Supreme Being. But this case is neither about religion nor an establishment of religion. Rather, it is about patriotism, and about the propriety of the government's encouraging Americans to honor their country and its symbol—the American Flag.

SUMMARY OF ARGUMENT

Review is merited in this case. The decision below held that the presence of two words—"under God"—transformed the recitation of the Pledge from an expression of patriotism into a "religious act" that violates the Establishment Clause when voluntarily recited by public school students pursuant to school district policy. The court of appeals' judgment is inconsistent with this Court's precedent and creates a split in the circuits. The two-member majority opinion was flanked by dissent from other members of the Court of Appeals for the Ninth Circuit, state leaders, the United States Senate, and even the President. The issues presented by this case are of obvious national import.

The court of appeals arrived at its judgment through application of this Court's school prayer precedents. The majority's conclusion that the school district's policy impermissibly coerces a religious act is founded on an erroneous premise. The Pledge is not a prayer and its recitation does not constitute a religious act. The Pledge is no more a religious act than such other acknowledgments of this

country's religious heritage as the national motto "In God We Trust," the references to the Creator in the Declaration of Independence, or references to God in "The Star Spangled Banner."

The Pledge has the secular purpose of promoting patriotism. Even with the words "under God," it is not an endorsement of religion. To the contrary, it has been characterized by this Court as consistent with the Establishment Clause. Nor does the school district's policy of voluntary Pledge recitation in classrooms lead to excessive government entanglement with religion.

ARGUMENT

I. THE PETITIONS FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

The United States' and Elk Grove School District, et al.'s petitions for writs of certiorari should be granted for three reasons:

First, the court of appeals decided an important federal question in a way that conflicts with relevant decisions of this Court. The panel majority held that recitation of the Pledge violated the "coercion test" announced by this Court in the school prayer case *Lee v. Weisman*, 505 U.S. 577 (1992). Appendix to the United States' Petition for Certiorari (No. 02-1574) ("Appendix") 11a ("we conclude that the school district policy impermissibly coerces a religious act and accordingly hold the policy unconstitutional"). Recitation of the Pledge, as amended by the 1954 Act, is neither a prayer nor a religious act. It is a secular, patriotic part of our national heritage. As this Court noted in *County of Allegheny v. ACLU*, 492 U.S. 573, 602-03 (1989), "[o]ur previous opinions have considered in dicta the motto ["In God We Trust"] and the pledge [with the phrase "under God" added by the 1954 Act], characterizing them as consistent with the

proposition that government may not communicate an endorsement of religious belief." Moreover, in *Lynch v. Donnelly*, the Court observed that "the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag . . . recited by thousands of public school children—and adults—every year" is a "reference to our religious heritage" in the same vein as "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers." *Lynch*, 465 U.S. 668, 675, 676 (1984). Under the decisions of this Court, the Pledge does not run afoul of the Establishment Clause.

Second, the court of appeals' judgment conflicts with that of another court of appeals that has addressed the same issue. Specifically, the panel majority decided that the school district's policy of non-compulsory recitation of the Pledge, including the words "under God," violates the Establishment Clause. Appendix 17a-18a. The Court of Appeals for the Seventh Circuit has ruled to the contrary. *Sherman v. Community Consol. School Dist. No. 21*, 980 F.2d 437 (7th Cir. 1992).

Third, the case involves a rule of nationwide application and an issue of national importance. The very day the Ninth Circuit's original opinion was issued, the United States Senate unanimously adopted a resolution decrying the ruling. S. Res. 292, 107th Cong., 2nd Sess., 148 Cong. Rec. S6105-06 (daily ed. June 26, 2002) (99-0 vote). The President of the United States expressed dismay as well. The White House, Office of the Press Secretary, "White House Reaction to Circuit Court Ruling" (June 26, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/06/print/20020626-8.html/ (as of June 27, 2002). Subsequently a letter signed by the attorneys general of forty-eight states and two territories was filed with the Ninth Circuit in support of rehearing. Letter from Alan G. Lance, Attorney General, State of Idaho, et al. to Cathy A. Catterson, Clerk, U.S. Court

of Appeals (July 25, 2002). The Pledge, whose wording is established by federal law, is recited by millions of Americans daily. The court of appeals' decision alters the Pledge's wording for public school students in nine states, while citizens in the rest of the nation, and citizens in the Ninth Circuit who attend non-school ceremonial functions, recite the Pledge enacted by Congress. Such a schism in the recitation of our national Pledge merits review.

II. NEITHER THE 1954 ACT, NOR THE PLEDGE AS A WHOLE, NOR THE SCHOOL DISTRICT'S DAILY RECITATION POLICY VIOLATES THE ESTABLISHMENT CLAUSE.

"Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST., amend. I. The same stricture applies, through the Due Process Clause of the Fourteenth Amendment, to state and local governments. *Everson v. Bd. of Education*, 330 U.S. 1 (1947). The Establishment Clause is directed not against every government action or activity that might "'happen[] to coincide or harmonize with the tenets of some . . . religions,'" *Lynch*, 465 U.S. at 682 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)), but against "'sponsorship, financial support, and active involvement of the sovereign in religious activity,'" *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)). Moreover, no "school can persuade or compel a student to participate in a religious exercise." *Lee*, 505 U.S. at 599.

Under *Lemon*, the test of whether there is an Establishment Clause violation has three prongs:

First, does the challenged statute or activity have a secular purpose? *Lemon*, 403 U.S. at 612. There is no violation if the purpose is at least partly secular, *Lynch*, 465 U.S. at 680-81 & n. 6; *American Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1121 (9th Cir. 2002) (re-

quiring plausible secular purpose), so long as the supposedly secular purpose isn't a sham, *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308-10 (2000).

Second, does the activity's principal or primary effect endorse or inhibit religion? *Lemon*, 403 U.S. at 612. In order to pass muster, it must do neither when considered in its overall context, *see Lynch*, 465 U.S. at 690-92 (O'Connor, J., concurring), and from the viewpoint of an informed and reasonable observer, *American Family Ass'n*, 277 F.3d at 1122.

Finally, does the activity foster "'an excessive government entanglement with religion'"? *Lemon*, 403 U.S. at 613 (quoting *Walz*, 397 U.S. at 674); *Agostini v. Felton*, 521 U.S. 203, 233 (1997). Such entanglement violates the Establishment Clause. A statute or activity that fails any prong of the *Lemon* test cannot stand. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

The "endorsement" test, first articulated by Justice O'Connor in *Lynch v. Donnelly*, essentially combines the first two prongs of the *Lemon* test. It holds that the "Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny*, 492 U.S. at 594 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)).

In its revised opinion, the court of appeals applied the "coercion" test of *Lee v. Weisman* to hold the school district's policy of voluntary Pledge recitation unconstitutional. Once it found that the school district's policy failed that test, the court did not consider the endorsement test or the *Lemon* test. Appendix 11a. The court of appeals held: (1) that teacher-led recitation of the Pledge "impermissibly coerces a religious act," and (2) "[i]n light of Supreme Court precedent," "the

school district's policy and practice of teacher-led recitation of the Pledge, with the inclusion of the added words 'under God,' violates the Establishment Clause." Appendix 11a, 17a. Although the panel majority expressly declined to decide the constitutionality of the 1954 Act, Appendix 18a, by necessary implication the judgment held the 1954 Act unconstitutional as applied to public school students in the Ninth Circuit.

A. This case involves neither compulsory recital of the Pledge nor compulsory presence at a government-sponsored religious activity.

Contrary to the court of appeals' majority opinion, there is no Establishment Clause violation in this case. In the first place, Dr. Newdow's daughter is not being required to recite the Pledge, Appendix 4a, so the compulsion that actuated the Court in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), is absent here. Were the Pledge a prayer, of course, even permitting objectors to absent themselves would not avoid an Establishment Clause violation, in part because prayer is inherently religious. *Lee*, 505 U.S. at 597-99 (prohibiting prayers offered by clergy at public school graduations); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (prohibiting teacher-led prayers in public schools regardless of whether students are compelled to recite them).

But the Pledge is not a prayer. It is a patriotic celebration of Nation and Flag.

> Patriotism is an effort by the state to promote its own survival, and along the way to teach those virtues that *justify* its survival. Public schools help to transmit those virtues and values. Separation of church from state does not imply separation of state from state. Schools are entitled to hold their causes and virtues out as worthy subjects of approval and adoption, to persuade even though they cannot compel, and even though those who

> resist persuasion may feel at odds with those who embrace the values they are taught.

Sherman, 980 F.2d at 444 (emphasis in original).

This Court, in striking down the Regents' Prayer in *Engel v. Vitale*, said that—

> there is . . . nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express *love for our country* by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such *patriotic or ceremonial occasions* bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

Engel, 370 U.S. at 435 n. 21 (emphasis added).

For this reason the concerns about requiring public school students' participation in a "religious exercise" that motivated the Court in *Lee*, 505 U.S. at 592-97, and the majority below, do not obtain here. *Lee* is limited by its "dominant facts," which involved "formal religious exercise" at a high school graduation ceremony. *Id.* at 586. That the facts involved prayer "control[led] the confines" of the holding in *Lee*. *Id.* Indeed, as Justice Scalia observed in his dissent, even though the students recited the Pledge, with the words "under God," at the graduation ceremony, only the prayer ran afoul of the Establishment Clause. *Id.* at 638-39 (Scalia, J., dissenting); *see id.* at 583 (opinion of the Court noting that "the students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers."). And as Judge O'Scannlain observed in his dissent from the denial of rehearing *en banc* below, "[n]o court, state or federal, has *ever* held, even now, that the Supreme Court's school prayer cases apply outside a

context of state-sanctioned formal religious observances." Appendix 78a-79a. The panel majority extended this Court's school prayer cases to the Pledge only by "obfuscat[ing] the nature of the exercise at issue." Appendix 79a.

B. The Pledge satisfies the test set forth in *Lemon v. Kurtzman*.

Moreover, the amended Pledge satisfies each prong of the test enunciated in *Lemon v. Kurtzman* and thereby passes the "endorsement" test discussed by the Court in *County of Allegheny*, 492 U.S. at 592-94.

1. *The Pledge, the 1954 Act, and the school district's recital policy have secular purposes.*

As originally enacted into federal law, the Pledge read: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation, indivisible, with liberty and justice for all." Act of June 22, 1942, ch. 435, § 7, 56 Stat. 380.[2] Indisputably the 1942 version had a secular purpose, for it contains no reference to anything of a religious character. Congress's addition of "under God" also had a secular purpose, namely distinguishing the United States—a religious nation, *see Zorach v. Clauson*, 343 U.S. 306, 313 (1952)—from its communist political adversaries, *Engel*, 370 U.S. at 440 (citing and quoting from legislative history of 1954 Act); *see Lynch*, 465 U.S. at 682 (secular purpose not vitiated because it may coincide with tenets of some religions).[3] References such as that in the Pledge "are uniquely suited to serve such wholly

---

[2] The Pledge dates to 1892 but was not enacted into federal law until fifty years later.

[3] Absent evidence to the contrary, a court should accept the purpose(s) set out in the text or legislative history of the statute or practice under review. *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring in the judgment).

secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases." *Lynch*, 465 U.S. at 717 (Brennan, J., dissenting).

Further, context is highly relevant under *Lemon*. The school district's policy calls for recital of the *entire* Pledge, not merely the words added by the 1954 Act, and it is the full text of the Pledge that is the proper measure of whether the activity has a secular purpose. *See County of Allegheny*, 492 U.S. at 595-97 & n. 46 (Blackmun and Stevens, JJ.) (stating that "the effect of the government's use of religious symbolism depends upon its context"); *Lynch*, 465 U.S. at 690-92 (O'Connor, J., concurring) (concluding that inclusion of creche in city's Christmas display was not an endorsement of religion in part because creche was displayed along with "purely secular symbols").[4] Indeed, Dr. Newdow himself concedes that the intent behind the school district's policy of Pledge recital is "the secular purpose of fostering patriotism." Appendix 49a.

The Pledge is secular in purpose. Although the relevant inquiry is the nature of the Pledge as a whole, even the 1954 Act has a secular purpose because the words it added appear amid secular, patriotic phrases and were added to distinguish this nation from communist regimes. Hence the first *Lemon* prong is satisfied.

---

[4] *Wallace's* focus on the Alabama act adding "or voluntary prayer" to an existing moment-of-silence statute is not to the contrary because the addition of "under God" to the Pledge was motivated by a desire to foster patriotism, not (as in *Wallace*) religion or prayer. *See Engel*, 370 U.S. at 440 (citing and quoting from legislative history of 1954 Act); *Wallace*, 472 U.S. at 78 n. 5 (O'Connor, J., concurring in the judgment) (suggesting that the 1954 Act merely acknowledges, rather than endorses, the presence of religion in American life).

2. *The Pledge, the 1954 Act, and the school district's recital policy neither endorse nor inhibit religion.*

The second *Lemon* prong, and the emphasis of the endorsement test, is whether the state-sponsored activity can be considered an endorsement of religion. *County of Allegheny*, 492 U.S. at 592-94; *Lemon*, 403 U.S. at 612. Neither the addition of "under God" nor the school district's policy that the Pledge be recited (though recital is not compulsory for Dr. Newdow's daughter or any other student) has the purpose or effect of endorsing religion as opposed to agnosticism or atheism. This is especially so when compared to activities this Court has ruled permissible under the Establishment Clause. These include praying at the opening of state legislative sessions, *Marsh v. Chambers*, 463 U.S. 783 (1983), the First Congress's appointing paid chaplains contemporaneously with its approval of the language of the Bill of Rights, *id.* at 787-91, "printing . . . 'In God We Trust' on coins, . . . opening court sessions with 'God save the United States and this honorable court,'" and including a creche or menorah as part of a municipality's overall Christmas holiday display, *Lynch*, 465 U.S. at 690-93; *County of Allegheny*, 492 U.S. 573.

> These government acknowledgements of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.

Lynch, 465 U.S. at 693.

Even Justice Brennan, who was "among the most stalwart of separationists," *Sherman*, 980 F.2d at 447, conceded that—

> [w]e have simply woven the [national] motto [In God We Trust] so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits. This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning. *The reference to divinity in the revised pledge of allegiance*, for example, may merely recognize the historical fact that our Nation was believed to have been founded "under God." Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact.

Abingdon School Dist. v. Schempp, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring) (emphasis added). Elsewhere in the same opinion, Justice Brennan took note of the claim that the Bible reading there at issue had secular purposes (i.e., fostering tolerance and harmony among the students; inspiring better discipline). *Id.* at 280-81. Even were that so, he continued, he could see no reason why that secular purpose could not be fulfilled by such *non-religious* activities as "daily recitation of the Pledge of Allegiance." *Id.* at 281 (emphasis added).

In 1989, five justices noted that the Court has characterized the Pledge as "consistent with the proposition that government may not communicate an endorsement of religious belief" and that "there is an obvious distinction between creche displays," on the one hand, "and references to God in the [national] motto and the pledge," on the other. *County of Allegheny*, 492 U.S. at 602-03. Thus, said the Court, including a menorah—admittedly a religious item when considered by itself—in a holiday display does not mean that

the municipality "has endorsed religious belief over nonbelief." *Id.* at 618. Similarly, including "under God" in the secular Pledge does not mean that the federal government has endorsed religious belief over nonbelief, and adopting a policy of Pledge recital does not mean that the Elk Grove school district has made such an endorsement, either. Thus there is no violation of the second prong of *Lemon*.

3. *The Pledge, the 1954 Act, and the school district's recital policy do not lead to excessive government entanglement with religion.*

The final *Lemon* prong is whether the activity leads to excessive government entanglement with religion or religious activity. *Lemon*, 403 U.S. at 612-13; *Agostini*, 521 U.S. at 233. There is no entanglement issue here. This Court has held that excessive entanglement does not occur where the government reviews religious grantees' adolescent counseling programs, *Bowen v. Kendrick*, 487 U.S. 589, 615-17 (1988), or audits categorical grants to religious colleges to ensure that they're not used to teach religion, *Romer v. Bd. of Public Works*, 426 U.S. 736, 764-65 (1976). Here, there is no government followup beyond the possibility that a principal occasionally may check whether the Pledge is being recited in her school's classrooms. The level of involvement thus is less than what has been permitted by this Court and the third *Lemon* prong presents no problem.

Thus the Pledge, the 1954 Act, and the school district's recital policy satisfy all three *Lemon* prongs: First, the principal purpose of the statutes and activity is patriotic and hence secular. Second, there is no endorsement of religion despite the reference to God. Finally, there is no potential for excessive entanglement of the government in religious activity, both because no such activity is present and because the likelihood of government involvement in overseeing the school district's recital policy is negligible.

CONCLUSION

For the foregoing reasons, as well as those advanced by the parties petitioning for certiorari, this Court should grant the petitions for certiorari, and should reverse the judgment of the Court of Appeals for the Ninth Circuit.

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No. 02-1574

In The

Supreme Court of the United States

THE UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL A. NEWDOW, ET AL.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF WALLBUILDERS, INC.

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INTEREST OF *AMICUS CURIAE*[1]

WallBuilders, Inc. is a 501(c)(3) organization that is dedicated to the restoration of the moral and religious foundation on which America was built. As such, the organization has a direct interest in seeing that students are allowed to say the full and official version of the Pledge of Allegiance in their schools. WallBuilders has a large base of supporters who are equally concerned with this issue.

This brief is filed pursuant to the consent of the counsel of record for all parties.

SUMMARY OF THE ARGUMENT

The Ninth Circuit Court of Appeals erred in ruling that the Elk Grove Unified School District's policy of having elementary aged school children recite the Pledge of Allegiance is unconstitutional. In ruling the Pledge unconstitutional, the Ninth Circuit overlooked this Court's *dicta* concerning the constitutionality of the Pledge. This brief will document in greater detail the assertion of the United States and Elk Grove Unified School District that the Ninth Circuit should have been guided by this Court's *dicta*. This brief will show certain types of *dicta* should be viewed as having binding

---

[1] No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the amicus curiae, its members, and its counsel.

authority or nearly so. The Ninth Circuit has itself decided that this Court's *dicta* is on the upper end of the precedential continuum. The Ninth Circuit should have been guided by this Court's *dicta* and ruled the policy of the school district constitutionally sound.

ARGUMENT

In their briefs, both the United States and Elk Grove Unified School District have mentioned this Court's *dicta* regarding the constitutionality of the Pledge of Allegiance. (Appellant United States' Petition for Writ of *Certiorari* at 19-20).; (Appellant School District's Petition for Writ of *Certiorari* at 6). The purpose of this brief is to expand upon reasons why the United States and Elk Grove Unified School District were correct in their assertions that the Ninth Circuit should have been guided by this Court's Pledge *dicta.*

I. THE NINTH CIRCUIT'S OPINION SHOULD BE REVERSED BECAUSE IT ERRED BY NOT GIVING DEFERENCE TO THE *DICTA* OF THIS COURT WHICH HAS STATED THAT THE PLEDGE OF ALLEGIANCE IS CONSTITUTIONAL.

The debate between the majority and minority opinions as well as Judge O'Scannlain's dissent

from denial of rehearing is over whether to decide the issue of the constitutionality of the Pledge of Allegiance by trying to extend the logic of this Court's Establishment Clause precedent or by using this Court's *dicta* regarding the Pledge of Allegiance. *Newdow v. United States Congress*, 328 F.3d 466, 471-82 (9th Cir. 2003) (O'Scannlain, J., dissenting from denial of rehearing *en banc*); *id.* at 482-90 (majority opinion); *id.* at 490-93 (minority opinion).

The problem with trying to apply the precedent in a new context is that this Court's Establishment Clause jurisprudence has often been unpredictable, as various Justices of this Court have acknowledged. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 107-12 (1985) (Rehnquist, J., dissenting) (stating that the application of the Establishment Clause since the late 1940s has little value because it has no basis in history and "is difficult to apply and yields unprincipled results."). With this type of unpredictable Establishment Clause jurisprudence, this Court should affirm the approach of the dissent below as well as the Seventh Circuit's decision in *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 439 (7th Cir. 1992). Following this Court's *dicta* would have been the best alternative for the Ninth Circuit. "[A]n inferior court had best respect what the majority [of the United States Supreme Court] says rather than read between the lines. If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances

seriously. If the Justices are just pulling our leg, let them say so." *Id.* at 448.

Below, the majority opinion recognized that this Court has stated in *dicta* that the words "one nation under God" in the Pledge of Allegiance are constitutional." *Newdow,* 328 F.3d at 489. However, the majority did not give deference to this Court's *dicta*, as it stated it would. *Id.* The question for this Court to resolve is whether the Ninth Circuit gave inadequate deference to this Court's *dicta*. For the reasons stated in the discussion below, the Ninth Circuit should have been guided, if not bound, by this Court's *dicta* regarding the constitutionality of the Pledge.

Dictum is "[a]n opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of adjudication . . . ." Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi.-Kent L. Rev. 655, 710 (1999). Judges and attorneys often divide *dicta* into *obiter dicta* and judicial *dicta* to determine the precedential value of individual *dictum*. *Id.* at 712-13. *Obiter*, or mere, *dicta* is an opinion expressed in passing and has less persuasive value. *Id.* at 713. Judicial *dicta* are "court's reasoned consideration and elaboration upon a legal norm" and have much more persuasive authority. *Id.* at 713-14.

In fact some courts, including this Court, give judicial *dicta* great weight. In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), this Court adhered to

judicial *dicta* which was regarded as a "well-established rationale upon which the Court based the results of its earlier decisions." *Id.* at 67. Similarly, this Court has stated that the "principle *of stare decisis* directs us to adhere not only to the holdings of . . . prior cases, *but also* to . . . explications of the governing rules of law." *County of Allegheny v. ACLU,,* 492 U.S. 573, 668 (1989) (emphasis added).

Likewise, the Third Circuit Court of appeals has noted that "[a] . . . distinction has been drawn between 'judicial *dictum'* and '*obiter dictum'*: Judicial *dicta* are conclusions that have been briefed, argued, and given full consideration even though admittedly unnecessary to decision. A judicial *dictum* may have great weight." *Cerro Metal Products v. Marshall*, 620 F.2d 964, 978 n.39 (3d Cir. 1980). Indeed, judicial *dicta* are of such serious consequence that some courts consider judicial *dicta* issued by supreme courts to be binding precedent: "A Wisconsin court has stated it thus: 'When a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision.'" *Id.* (citation omitted).

Furthermore, the distinction between *obiter dictum* and *judicial dictum* is not a bright line.. Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi.-Kent L.

Rev. 655, 717-18 (1999). Hard and fast divisions "are probably wrong" and can lead to "intellectual chicanery." *Id.* at 730, 776. It is not easy to determine what constitutes judicial *dictum*. *Id.* at 735. In fact, *dicta* are better thought of as being on a continuum. *Id.* at 740. Under this view, *obiter dicta*, in which a court has not deliberated over what it has said, *see id.*, rest at the lower end of the continuum. Judicial *dicta*, in which a court has more deliberately considered what it has said to guide future litigation and in which the parties may have briefed the issue, *id.* at 730, rest at the upper end of the continuum. Therefore, it is important under this view to realize that *dicta*, even *dicta* other than that which is *technically* judicial *dicta*, can lie very close to that end of the continuum and can be worthy of receiving precedential or near-precedential value.

Ironically, the Ninth Circuit itself has placed *dicta* issued by the United States Supreme Court on the upper end of the continuum. *See United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996). According to the Ninth Circuit, Supreme Court *dicta* is to be treated "with due deference." *Id.* One Ninth Circuit judge has stated that Supreme Court *dicta* must not be discarded lightly. *Navajo Nation v. U.S. Dept. of Health and Human Services*, 285 F.3d 864, 877 (9th 2002) (Fletcher, J., dissenting). Another stated, "[D]icta of the Supreme Court have a weight that is greater than ordinary judicial dicta as prophecy of what the Court might hold. We should

not blandly shrug it off because they were not a holding." *Zal v. Steppe*, 968 F.2d 924, 935 (9th Cir. 1992) (Noonan, J., concurring in part and dissenting in part). The Ninth Circuit, therefore, has placed Supreme Court *dicta* high on the continuum giving it great weight – even when that the *dictum* is not judicial *dictum*. For example, this Court's *dicta* at issue in *Zal* must be considered obiter *dicta*, yet Judge Noonan pointed out the weight they deserved. *See id.*

Certainly, this Court's *dicta* regarding the Pledge of Allegiance are worthy of even more weight since they are much closer to the judicial *dicta* end of the continuum. While the constitutionality of the Pledge may not have been extensively briefed and argued, the pertinent Establishment Clause test and principles *were* briefed and argued in all the cases in which the Pledge was used as an illustration. For example, this Court has stated, "Our previous opinions have considered in *dicta* the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." *County of Allegheny v. ACLU*, 492 U.S. 573, 602-03 (1989). This Court also stated that one's "religiously based refusal" to recite the pledge should not interfere with the right of others to recite it. *See Newdow*, 328 F.3d at 492 (Fernandez, J., concurring in part and dissenting in part) (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). In fact, five

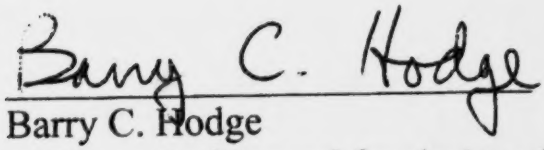
current Justices of this Court, as well as eight prior Justices, have recognized that including "under God" in the Pledge of Allegiance does not impose a danger to society by establishing a theocracy or inhibiting one's religious beliefs. *Id.* at 491 (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 602-03, 672-73 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 78 n (1985); *Lynch v. Donnelly*, 465 U.S. 668, 676, 693, 716, (1984); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 306-08 (1963).

The majority opinion below dismissed this Court's *dicta* because this Court has never *directly* addressed the issue and has not applied the Establishment Clause tests to it. *Newdow*, 328 F.3d at 489. Based on the Ninth Circuit's own precedent, Supreme Court *dicta* should be given great deference. *Baird*, 85 F.3d at 453. This Court has stated multiple times that the pledge does not violate the Establishment Clause. *See Newdow*, 328 F.3d at 491 (Fernandez, J., concurring in part and dissenting in part) (noting cases cited in the previous paragraph). Because this Court has declared the Pledge to be constitutional on multiple occasions, and because each of the cases addressed basic First Amendment principles, this Court did not make those statements regarding the Pledge without due consideration. Therefore, the Ninth Circuit erred by not being guided by the applicable *dicta* from this Court. Had it been so guided, it would have upheld the constitutionality of the Pledge. Indeed, this Court has already decided the issue.

CONCLUSION

For the foregoing reasons, *amicus* respectfully request this Court to grant Petitioners' writ of certiorari.

Respectfully submitted
This 30th day of May 2003



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Nos. 02-1574 and 02-1624

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In The Supreme Court of the United States

UNITED STATES OF AMERICA,
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MICHAEL A. NEWDOW, ET AL.,
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ELK GROVE UNIFIED SCHOOL DISTRICT,
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v.

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On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the inclusion of the phrase "under God" in the Pledge of Allegiance to the United States Flag violates the Establishment Clause of the First Amendment.

2. Whether a noncustodial parent, who lacks the legal authority to determine his child's education or religious upbringing, has Article III standing to challenge educational practices undertaken by the school in which the custodial parent has chosen to place the child.

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STATEMENT OF *AMICI* INTEREST

The States of Idaho and Oklahoma and 47 other States write to urge the Court to grant *certiorari* in this case.[1] This brief focuses upon the first question presented by the Petitioners, addressing the application of the Establishment Clause of the First Amendment to the United States Constitution to the Pledge of Allegiance.

The decision of the Ninth Circuit – holding that "the school district's policy and practice of teacher-led recitation of the Pledge, with the inclusion of the added words 'under God,' violates the Establishment Clause," U.S. Pet. App. at 17a – conflicts with opinions and observations made by this Court and individual Justices in Establishment Clause cases, with a decision issued by the Seventh Circuit Court of Appeals, and with numerous rulings and observations made by United States District Courts since 1954. Moreover, 41 states have laws, and three more states have recently passed laws, similar to the California law underlying the *Newdow* case, providing for recitation of the Pledge of Allegiance in public schools.

The Ninth Circuit's opinion is a startling departure from Establishment Clause jurisprudence, as complex as that body of law might be. Left alone, the Ninth Circuit's opinion "bans the voluntary recitation of the Pledge of Allegiance in the public schools of the nine western states thereby directly affecting over 9.6 million students, necessarily *implies* that both an Act of Congress and a California law are unconstitutional, . . . and threatens cash-strapped

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[1] It is understood that the Attorney General of California will file an *amicus* brief on behalf of California's Governor, urging the Court to grant *certiorari* in this case.

school districts and underpaid teachers with the specter of civil actions for money damages pursuant to 42 U.S.C. § 1983." U.S. Pet. App. at 68a-69a (emphasis in original; footnotes and citations omitted). Before *Newdow*, the boundaries of the Establishment Clause in the public school setting were clearly understood to protect the Pledge of Allegiance and similar patriotic exercises. Accordingly, the States urge this Court to grant the petitions and consider summary reversal of the Ninth Circuit's judgment.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision defies a nation.[2] It begs this Court to exercise judicial discretion in favor of granting the petitions for two compelling reasons consistent with Rule 10 of the Supreme Court Rules. First, the *Newdow* decision is of nationwide interest, as that interest is expressed in public policy through the laws of 41 states. Second, the *Newdow* decision clearly conflicts with the Seventh Circuit Court of Appeals' decision in *Sherman v. Community Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir.

[2] Shortly after the Ninth Circuit's original decision in *Newdow*, the attorneys general of 50 states and territories sent a letter to the Clerk of the Ninth Circuit, in support of the State of California's motion for rehearing with suggestion for *en banc* review. *See* 9th Cir. R. 25-2 (communications to the court). The letter, dated July 23, 2002, was not made a part of the record in this case, but it was discussed at a congressional hearing and made a part of the committee record. *Ninth Circuit Court of Appeals Reorganization Act of 2001: Hearing on H.R. 1203 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 107th Cong., 2nd Sess., 11, 91-96 (2002) (statement of Alan G. Lance, former Idaho Attorney General (1995-2003), submitting the letter to the subcommittee for the record).

1992), *cert. denied*, 508 U.S. 950 (1993). *Newdow* also conflicts with opinions and observations made by this Court and individual Justices confirming the constitutionality of the Pledge of Allegiance. Indeed, many other federal courts have relied upon these opinions and observations in evaluating Establishment Clause issues in public school settings, including recitation of the Pledge of Allegiance.

I. The Court Should Grant *Certiorari* Because The Ninth Circuit's Holding Defies The Common Understanding, Embodied In 41 State Statutes, That The Pledge Is Constitutional.

In its amended opinion, the Ninth Circuit apparently decided that it should narrow its initial holding. In the amended opinion, the Ninth Circuit held the "school district's *policy* and *practice* of teacher-led recitation of the Pledge, with the inclusion of the added words 'under God,' violates the Establishment Clause." U.S. Pet. App. 17a (emphasis added). In its original opinion, the Ninth Circuit explicitly held both the federal statute, 4 U.S.C. § 4 (1998), and the school district policy and practice to be unconstitutional. U.S. Pet. App. 52a. Whether or not this was done "in an effort to avoid ultimate Supreme Court review," Circuit Judge O'Scannlain is correct in his dissent from the Ninth Circuit's denial of rehearing *en banc* when he says, regarding the difference between the holdings, that "the amended decision is every bit as bold as its predecessor." U.S. Pet. App. 68a.

Teachers in the Elk Grove Unified School District (EGUSD) begin each school day by leading their students in the Pledge of Allegiance. U.S. Pet. App. 2a. As the Ninth Circuit recognized, this practice is "[i]n accordance with state law and a school district rule. . . . " U.S. Pet. App. 2a.

The school district rule requires that "[e]ach elementary school class [shall] recite the pledge of allegiance to the flag once each day." U.S. Pet. App. 3a. As the Ninth Circuit recognized, the policy was promulgated "[t]o implement the California statute." U.S. Pet. App. 3a. The California statute requires public schools to "begin each day with 'appropriate patriotic exercises' and that '[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy' this requirement." U.S. Pet. App. 2a, citing Cal. Educ. Code § 52720 (1989). The Pledge of Allegiance is a creature of federal statute which defines the pledge to contain the words "under God." 4 U.S.C. § 4.

The EGUSD's policy and practice do not stand alone and did not originate in the minds of the school board or the teachers. The EGUSD promulgated its policy in order to comply with a mandatory state law that, in turn, depends upon the federal codification of the words that are to be recited each school day. The teachers are simply doing their jobs as required by law.

The California state law is not unusual. Laws providing for recitation of the Pledge of Allegiance in public schools exist in 41 states. *See* Ala. Code § 16-43-5 (West 2001) (students must be afforded opportunity to recite the pledge); Alaska Stat. § 14.03.130 (2000) (the pledge must be recited regularly by willing students); Ariz. Rev. Stat. Ann. § 15-506 (2002) (a time must be set aside for willing students to recite the pledge); Ark. Code Ann. § 6-16-122(a)(7) (Michie 1999) (school boards may allow and encourage teachers to read or post the pledge); Cal. Educ. Code § 52720 (West 1989) (the giving of the pledge shall satisfy the requirement of a daily patriotic exercise); Conn. Gen. Stat. § 10-230(c) (2003) (must have policy to ensure time is available for willing students to recite the pledge);

Del. Code Ann. tit. 14, § 4105 (1999) (pledge shall be performed in the opening exercises of public schools); Fla. Stat. ch. 1003.44(1) (2002) (pledge shall be recited at the beginning of each day by willing students); Ga. Code Ann. § 20-2-310(c)(1) (2001) (students must be afforded an opportunity to recite the pledge each day); Idaho Code § 33-1602(2)-(5) (2001) (the pledge shall be offered each day to willing students); S.H.A. 105 ILCS 5/27-3 (Smith-Hurd 1998) (under Illinois law, the pledge shall be recited each day by willing students); Ind. Code Ann. § 20-10.1-4-2.5 (Burns 2000) (the pledge is a protected writing – principal or teacher may read the pledge in school building, classroom, or at any school event); Kan. Stat. Ann. § 72-5308 (2002) (a program of patriotic observation must include a daily recitation of the pledge); Ky. Rev. Stat. Ann. § 158.175(2) (Michie/Bobbs-Merrill 2001) (school board shall establish a policy for the daily recitation of the pledge by willing students); La. Rev. Stat. Ann. § 17:2115(B) (West 2001) (each school must be allowed the opportunity for group recitation of the pledge); Me. Rev. Stat. Ann. tit. 20-A, § 4805(1) (West 1993) (teachers have a duty to impress upon the students suitable references and observances of the flag); Md. Code Ann. Educ. § 7-105(c) (2001) (all willing students and teachers shall recite the pledge in unison); Mass. Gen. Laws Ann. ch. 71, § 69 (2002 Cum. Supp.) (teachers shall lead students in the pledge at the beginning of each school day); Miss. Code Ann. § 37-13-7(1) (2001) (teachers are required to have their students recite the pledge at least once each school day); Mo. Rev. Stat. § 171.021(2) (2002 Cum. Supp.) (the pledge must be recited by each willing student at least once per week); Mont. Code Ann. § 20-7-133 (2001) (the pledge must be recited by willing students and teachers in all public schools); Nev. Rev. Stat. Ann. § 389.040 (Michie 2002) (time must be set

aside at the beginning of each school day for students to recite the pledge); N.H. Rev. Stat. Ann. § 194:15-c (2002 Cum. Supp.) (a time shall be set aside each school day for willing students to recite the pledge); N.J. Stat. Ann. § 18A:36-3(c) (West 1999) (school board must require willing students to recite the pledge every school day); N.M. Stat. Ann. § 22-5-4.5 (Michie 2001 Cum. Supp.) (the pledge shall be recited daily); N.Y. Educ. Law § 802(1) (McKinney 2000) (the commissioner must prepare a program for a daily pledge); N.C. Gen. Stat. § 115C-47(29a) (1999) (school boards are encouraged to adopt a policy to provide for willing students to recite the pledge on a regular basis); N.D. Cent. Code § 15.1-19-03.1(4) (2001 Pocket Supp.) (school boards may authorize voluntary recitation of the pledge by teachers and students at the beginning of each school day); Ohio Rev. Code Ann. § 3313.602(A) (Baldwin 1999) (school board shall adopt a policy specifying whether the pledge shall be a part of the school's program); Okla. Stat. Ann. tit. 70, § 24-106 (West 2003 Elec. Update) (willing students are authorized to recite the pledge at the beginning of each school day); Or. Rev. Stat. § 339.875 (2001) (school boards must provide an opportunity for willing students to recite the pledge at least once each week of the school year); 24 Pa. Cons. Stat. Ann. § 7-771 (1992) (willing students shall be provided the opportunity to recite the pledge at the beginning of each school day); R.I. Gen. Laws § 16-22-11 (2001) (all public schools shall commence each day with a voluntary recitation of the pledge); S.C. Code Ann. § 59-1-455 (2000 Cum. Supp.) (all willing students must recite the pledge each school day); S.D. Codified Laws Ann. § 13-24-17.2 (2002) (the right to recite the pledge shall not be limited or infringed); Tenn. Code Ann. § 49-6-1001(c)(1) (2002) (school boards shall require daily recitation of the pledge

by willing students); Utah Code Ann. § 53A-13-101.6 (2000) (willing students shall recite the pledge at the beginning of each school day); Va. Code Ann. § 22.1-202(C) (Michie 2002 Cum. Supp.) (willing students shall recite the pledge at the beginning of each school day); Wash. Rev. Code Ann. § 28A.230.140 (West 1997) (willing students shall recite the pledge in each classroom at the beginning of each school day and at the opening of all school assemblies); W. Va. Code § 18-5-15b (1999) (willing students shall recite the pledge at the beginning of each school day); Wis. Stat. Ann. § 118.06 (West 1999) (the pledge shall be offered each day for willing students).[3]

In addition, three states have recently passed legislation similar to the laws discussed above. *See* H.B. 03-1368, 64th Gen. Assembly, 1st Reg. Sess. (Colo. 2003) (passed by the General Assembly and signed by the Governor on June 3, 2003, it requires each school day to begin with a recitation of the pledge, and it will be effective 90 days after adjournment of the General Assembly); S.F. 287, 83rd Reg. Sess. (2003 Minn. Sess. Law Serv. ch. 120, § 1) (passed by the Legislature and approved by the Governor on May 19, 2003, it requires willing students to recite the pledge at least once per week, and it is effective for the 2003-04 school year and later); S.B. 83, 78th Leg., (Tex. 2003) (passed by the Legislature and signed by the Governor on May 28, 2003, it requires recitation of the pledge once per day, and it will become effective beginning with the 2003-04 school year).

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[3] The relevant sections of all the cited state laws are appended to this brief in alphabetical order.

The States urge that the Establishment Clause issue is of broad national interest and concern, as reflected through the laws of the states as discussed above. Certainly, the Ninth Circuit's power reaches only so far, but it is not right for the Pledge of Allegiance to the Flag of the United States of America to be treated differently in the eyes of the law in our indivisible nation.

II. The Court Should Grant *Certiorari* Because The Ninth Circuit's Decision Conflicts With Establishment Clause Jurisprudence.

The Petitioners thoroughly set forth the conflict between circuits. U.S. Pet. at 14; EGUSD Pet. at 8-10. In the *Sherman* case, the Seventh Circuit held that "schools may lead the Pledge of Allegiance daily, so long as pupils are free not to participate." *Sherman*, 980 F.2d at 439. The Seventh Circuit's decision is consistent with this Court's fundamental requirement of voluntariness enunciated in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), and it flows unimpeded from observations made by this Court and individual Justices in Establishment Clause cases.

The Petitioners have also thoroughly brought to the Court's attention the fact that the Ninth Circuit's decision is wholly inconsistent with this Court's observations on the Pledge of Allegiance. U.S. Pet. at 14-19; EGUSD Pet. at 8-10. The Ninth Circuit, however, dismissed this Court's statements as *dicta* and claimed, incredibly, that its holding was "not inconsistent with this *dicta*." U.S. Pet. App. at 15a.

With roots in what Circuit Judge O'Scannlain described as the "fountainhead of all school prayer cases," this Court has consistently commented favorably upon the Pledge of Allegiance. U.S. Pet. App. at 71a. In *Engel v. Vitale*,

370 U.S. 421 (1962), the Court described the boundaries of its holding by explaining that school children may recite historical documents or sing officially espoused anthems which contain references to God because "[s]uch patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise" of directing students to recite a prayer composed by state officials. *Engel*, 370 U.S. at 435 n.21. The observations made thereafter by this Court and individual Justices concerning the Pledge of Allegiance flow directly from the Establishment Clause boundary set in *Engel*.

Dicta is defined as a judicial opinion "which does not embody the resolution or determination of the court." Black's Law Dictionary 408 (5th ed. 1979). Admittedly, in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Court said its previous characterizations of the pledge and national motto as being consistent with the Establishment Clause were *dicta*, but in the next breath the Court once again returned to the understood boundaries of the Establishment Clause by saying there is an "obvious difference between crèche displays and references to God in the motto and the pledge." *County of Allegheny*, 492 U.S. at 602.

The States urge that, whether or not considered *dicta* in a technical sense, the Supreme Court's observations on the Pledge were and are integral to the Establishment Clause issue. The statements were not unrelated to the main issue – they were not musings hidden in a footnote of an Admiralty Clause case. The Court's analytical observations served a vital function by setting a clear boundary and assisting the public's understanding of the Court's decision.

The Ninth Circuit's decision can hardly be characterized as "not inconsistent with" the Supreme Court's and individual Justices' comments upon the application of the

Establishment Clause to the Pledge of Allegiance. The Ninth Circuit held the Pledge of Allegiance to be unconstitutional. This Court has said, or at least strongly implied, that it is not. To brush aside this Court's written history and then deny that anything inconsistent with that history has occurred is indeed "wrong, very wrong." U.S. Pet. App. at 67a.

Many other federal courts have cited and relied upon the *Engel* line of cases in commenting and ruling upon the Pledge of Allegiance. The Ninth Circuit decision is a lonely one that goes against the considered judgments and analyses of numerous other federal courts.

Somewhat ironically, the earliest published federal case to have directly addressed an Establishment Clause challenge to the 1954 version of the Pledge of Allegiance came from California. *Smith v. Denny*, 280 F. Supp. 651 (E.D. Cal. 1968), *appeal dismissed*, 417 F.2d 614 (1969).[4] Therein, the court resisted plaintiffs' invitation to remove the words "under God" from the Pledge of Allegiance, and ruled it to be consistent with the Free Exercise Clause and the Establishment Clause. *Smith*, 280 F. Supp. at 654. In so doing, the court relied heavily upon *Engel*.[5] *Smith*, 280 F. Supp. at 653.

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[4] The Ninth Circuit dismissed the appeal because the plaintiffs' interest in the litigation ended when their children graduated from high school. *Smith*, 417 F.2d at 614.

[5] Two years after the court's decision in *Smith*, the Ninth Circuit took an appeal in an Establishment Clause case challenging the national motto, "In God We Trust." The Ninth Circuit upheld the national motto, quoting the key language from the *Engel* case, which is at the heart of the Petitioners' argument, and ruling that *Engel* "direct[s] the result here . . . ." *Aronow v. United States*, 432 F.2d 242, 243-44 (9th Cir. 1970). In *Newdow*, the Ninth Circuit said the *Aronow* case is "distinguishable in many ways from the present case," the most

(Continued on following page)

Most recently, the United States District Court for the Eastern District of Virginia upheld a similar, albeit broader, challenge to the Pledge of Allegiance. *Myers v. Loudoun County Sch. Bd.*, No. CIV02-1528-A, 2003 WL 21011172 (E.D. Va. Feb. 21, 2003). Therein, the court ruled the Pledge of Allegiance was neither a violation of the Establishment Clause, nor a violation of the Free Exercise Clause. The *Myers* case was issued seven days before the Ninth Circuit denied rehearing and issued its amended opinion in *Newdow*.

A number of other federal courts have commented favorably on the Pledge, in a manner similar to that of this Court in defining the boundaries of the Establishment Clause in the public school setting and helping the public to understand the reach of the judgment. *See Glassroth v. Moore*, 229 F. Supp.2d 1290, 1308 (M.D. Ala. 2002) (distinguishing "ceremonial deisms" from public acknowledgments of a sectarian God); *ACLU of Tenn. v. Rutherford County, Tenn.*, 209 F. Supp.2d 799, 814 (M.D. Tenn. 2002) (listing the Pledge of Allegiance as one of at least twelve examples of permissible government acknowledgments of the role of religion in American life); *Doe v. Harlan County Sch. Dist.*, 96 F. Supp.2d 667, 676 (E.D. Ky. 2000) (discussion of ceremonial deisms); *ACLU of Ky. v. McCreary County, Ky.*, 96 F. Supp.2d 679, 688 (E.D. Ky. 2000) (discussion of ceremonial deisms); *ACLU of Ky. v. Pulaski County, Ky.*, 96 F. Supp.2d 691, 700 (E.D. Ky. 2000) (discussion of ceremonial deisms); *Books v. City of Elkhart, Ind.*, 79 F. Supp.2d 979, 989-92 (N.D. Ind. 1999), *rev'd on*

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important distinction being that "school children are not coerced into reciting or otherwise actively led to participating in an endorsement of the markings on the money in circulation." U.S. Pet. App. at 15a n.8.

other grounds, 235 F.3d 292 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001) (discussing the Pledge of Allegiance and other practices from our history and traditions that contain religious references and are consistent with the First Amendment); *Suhre v. Haywood County, N.C.*, 55 F. Supp.2d 384, 396-97 (W.D. N.C. 1999), (similar historical overview); *ACLU of Ohio v. Capitol Square Review and Advisory Bd.*, 20 F. Supp.2d 1176, 1181-82 (S.D. Ohio 1998), *rev'd on other grounds*, 210 F.3d 703 (6th Cir. 2000), *reh'g en banc granted and opinion vacated*, 222 F.3d 268 (6th Cir. 2000), *aff'd on reh'g en banc*, 243 F.3d 289 (6th Cir. 2001) (citing Supreme Court cases with favorable references to the pledge and saying that the Court has "never suggested" that the pledge is unconstitutional); *Coles v. Cleveland Bd. of Educ.*, 950 F. Supp. 1337, 1342 (N.D. Ohio 1996), *rev'd on other grounds*, 171 F.3d 369 (6th Cir. 1999) (listing the pledge as an example of an appropriate expression of religion); *Bown v. Gwinnett County Sch. Dist.*, 895 F. Supp. 1564, 1577-78 (N.D. Ga. 1995), *aff'd*, 112 F.3d 1464 (11th Cir. 1997) (similar discussion); *Donaggio v. Arlington County, Va.*, 880 F. Supp. 446, 455 n.20 (E.D. Va. 1995), *aff'd*, 78 F.3d 578 (4th Cir. 1996) (noting that the Supreme Court has not suggested that voluntary flag salutes are forbidden); *Chaudhuri v. Tennessee*, 886 F. Supp. 1374, 1384-85 (M.D. Tenn. 1995), *aff'd*, 130 F.3d 232 (6th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998) (listing the pledge as an example of a tradition that does not violate the Establishment Clause); *Carpenter v. City and County of San Francisco*, 803 F. Supp. 337, 346 (N.D. Cal. 1992), *rev'd on other grounds*, 93 F.3d 627 (9th Cir. 1996), *cert. denied*, 520 U.S. 1118 (1997) (similar discussion); *Allen v. Consolidated City of Jacksonville, Fla.*, 719 F. Supp. 1532, 1538 (M.D. Fla. 1989), *aff'd*, 880 F.2d 420 (11th Cir. 1989) (recognizing that the Supreme Court has rejected the view that any governmental reference to God has the effect of

advancing religion); *Smith v. Lindstrom*, 699 F. Supp. 549, 571-72 (W.D. Va. 1988), *aff'd*, 895 F.2d 953 (4th Cir. 1990), *cert. denied*, 498 U.S. 823 (1990) (discussion of *de minimus* entanglements between church and state); *Jewish War Veterans of the U.S. v. United States*, 695 F. Supp. 3, 11 (D. D.C. 1988) (listing the pledge as an example of a government reference to God that does not violate the Establishment Clause); *Reed v. Van Hoven*, 237 F. Supp. 48, 56 (W.D. Mich. 1965) ("the pledge of allegiance and patriotic songs or readings are permissible at any time, provided they are voluntary").

This body of federal law is uniform and thorough with respect to the application of the Establishment Clause to the Pledge of Allegiance and other similarly patriotic exercises that are intended to honor the United States of America. The Ninth Circuit's decision stands alone against the weight of rulings and observations made by the Supreme Court, individual Justices, the Seventh Circuit, and numerous lower federal courts.

CONCLUSION

For the foregoing reasons, the *amici* States urge the Court to grant the petitions and consider summary reversal.

Respectfully submitted,

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Ala. Code § 16-43-5. Students to be afforded opportunity to voluntarily recite pledge of allegiance to United States flag.

The State Board of Education shall afford all students attending public kindergarten, primary and secondary schools the opportunity each school day to voluntarily recite the pledge of allegiance to United States flag.

Alaska Stat. § 14.03.130. Display of flags and pledge of allegiance.

(a) United States and Alaska flags shall be displayed upon or near each principal school building during school hours and at other times the governing body considers proper. The governing body shall require that the pledge of allegiance be recited regularly, as determined by the governing body. A person may recite the following salute to the flag of the United States or maintain a respectful silence: "I pledge allegiance to the flag of the United States of American and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all."

(b) A school district shall inform all affected persons at the school of their right not to participate in the pledge of allegiance. The exercise of the right not to participate in the pledge of allegiance may not be used to evaluate a student or employee or for any other purpose.

Ariz. Rev. Stat. Ann § 15-506. Flag display; recitation of the pledge of allegiance

School authorities shall purchase a United States flag, flagstaff and appurtenances, display the flag upon or near the school building during school hours and at such other times as they direct and set aside a specific time each day for those students who wish to recite the pledge of allegiance to the United States flag.

Ark. Code Ann. § 6-16-122. American heritage.

(a) Local school boards may allow and encourage any teacher or administrator in a public school district of this state to read or post in a public school building, classroom, or event any excerpts or portions of:

* * *

(7) The Pledge of Allegiance;

* * *

Cal. Educ. Code § 52720. Daily performance of patriotic exercises in public schools

In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.

In every public secondary school there shall be conducted daily appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy such requirement. Such patriotic exercises for secondary schools shall be conducted in accordance with the regulations which shall be adopted by the governing board of the district maintaining the secondary school.

Conn. Gen. Stat. Ann. § 10-230. Flags in schoolrooms and schools. Policy on the reciting of the "Pledge of Allegiance"

* * *

(c) Each local and regional board of education shall develop a policy to ensure that time is available each school day for students in the schools under its jurisdiction to recite the "Pledge of Allegiance". The provisions of this subsection shall not be construed to require any person to recite the "Pledge of Allegiance".

Del. Code Ann. tit. 14, § 4105. Salute to flag and pledge of allegiance.

In the opening exercises of every free public school each morning, the teachers and pupils assembled shall salute and pledge allegiance to the American flag as follows: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all."

Fla. Stat. § 1003.44. Patriotic programs; rules

(1) Each district school board may adopt rules to require, in all of the schools of the district, programs of a patriotic nature to encourage greater respect for the government of the United States and its national anthem and flag, subject always to other existing pertinent laws of the United States or of the state. When the national anthem is played, students and all civilians shall stand at attention, men removing the headdress, except when such headdress is worn for religious purposes. The pledge of allegiance to the flag, "I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all," shall be rendered by students standing with the right hand over the heart. The pledge of allegiance to the flag shall be recited at the beginning of the day in each public elementary, middle, and high school in the state. Each student shall be informed by posting a notice in a conspicuous place that the student has the right not to participate in reciting the pledge. Upon written request by his or her parent, the student must be excused from reciting the pledge. When the pledge is given, civilians must show full respect to the flag by standing at attention, men removing the headdress, except when such headdress is worn for religious purposes, as provided by Pub. L. ch. 77-435, s. 7, approved June 22, 1942, 56 Stat. 377, as amended by Pub. L. ch. 77-806, 56 Stat. 1074, approved December 22, 1942.

* * *

Ga. Code Ann. § 20-2-310. Access to campus or to student directory information by military forces; voter registration;

pledge of allegiance; instruction in correct use and display of flag

* * *

(c)(1) Each student in the public schools of this state shall be afforded the opportunity to recite the Pledge of Allegiance to the flag of the United States of America during each school day. It shall be the duty of each local board of education to establish a policy setting the time and manner for recitation of the Pledge of Allegiance. Such policy shall be established in writing and shall be distributed to each teacher within the school.

Idaho Code § 33-1602. United States Constitution – National flag and colors – National anthem – "America" – Citizenship.

* * *

(2) Instruction in the proper use, display and history of and respect for the American flag and the national colors shall be given in all elementary and secondary schools. Such instruction shall include the pledge of allegiance to the flag, the words and music of the national anthem, and of "America."

(3) Every school board of trustees shall cause the United States flag to be displayed in every classroom during the school hours of each school day.

(4) Every public school shall offer the pledge of allegiance or the national anthem in grades one (1) through twelve (12) at the beginning of each school day.

(5) No pupil shall be compelled, against the pupil's objections or those of the pupil's parent or guardian, to recite the pledge of allegiance or to sing the national anthem.

* * *

Ill. Ann. Stat. ch. 105, para. 5/27-3. Patriotism and principles of representative government – Proper use of flag – Method of voting – Pledge of Allegiance

American patriotism and the principles of representative government, as enunciated in the American Declaration of Independence, the Constitution of the United States of America and the Constitution of the State of Illinois, and the proper use and display of the American flag, shall be taught in all public schools and other educational institutions supported or maintained in whole or in part by public funds. No student shall receive a certificate of graduation without passing a satisfactory examination upon such subjects.

Instruction shall be given in all such schools and institutions in the method of voting at elections by means of the Australian Ballot system and the method of the counting of votes for candidates.

The Pledge of Allegiance shall be recited each school day by pupils in elementary and secondary educational institutions supported or maintained in whole or in part by public funds.

Ind. Code Ann. § 20-10.1-4-2.5. Protected writings, documents, and records of American history or heritage

Sec. 2.5. (a) This section applies to the following writings, documents, and records:

* * *

(4) The Pledge of Allegiance.

* * *

(b) A school corporation may allow a principal or teacher in the school corporation to read or post in a school building or classroom or at a school event any excerpt or part of a writing, document, or record listed in subsection (a).

Kan. Stat. Ann. § 72-5308. Patriotic exercises; flag etiquette, observation of holidays.

(a) The state board of education shall prepare for the use of the public schools a program providing for patriotic exercises the board deems to be expedient, under such instructions as may best meet the varied requirements of the different grades in such schools. The program of patriotic observation of every school district shall include:

(1) A daily recitation of the pledge of allegiance to the flag of the United States of America;

* * *

Ky. Rev. Stat. Ann. § 158.175. RECITATION OF LORD'S PRAYER AND PLEDGE OF ALLEGIANCE; INSTRUCTION IN PROPER RESPECT FOR AND DISPLAY OF THE FLAG; OBSERVATION OF MOMENT OF SILENCE OR REFLECTION

* * *

(2) The board of education of each school district shall establish a policy and develop procedures whereby the pupils in each elementary and secondary school may participate in the pledge of allegiance to the flag of the United States at the commencement of each school day.

* * *

La. Rev. Stat. Ann. § 17:2115. Silent prayer or meditation; pledge of allegiance

* * *

B. Each parish and city school board in the state shall also permit the proper authorities of each school to allow the opportunity for group recitation of the "Pledge of Allegiance to the Flag". Such recitation shall occur at the commencement of the first class of each day in all grades and in all public schools.

Me. Rev. Stat. Ann. tit. 20-A, § 4805. Other special observances

Other special observances shall be as follows.

1. Flag. It shall be the duty of instructors to impress upon the youth by suitable references and observances the

significance of the flag, to teach them the cost, the object and principles of our government, the inestimable sacrifices made by the founders of our Nation, the important contribution made by all who have served in the armed services of our country since its inception and to teach them to love, honor and respect the flag of our country that costs so much and is so dear to every true American citizen.

* * *

Md. Code Ann. Educ. § 7-105. Patriotic observances

* * *

(c) Each county board shall:

(3) Require all students and teachers in charge to stand and face the flag and while standing give an approved salute and recite in unison the pledge of allegiance as follows: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all."

* * *

Mass. Gen. Laws Ann. ch. 71, § 69. Display of national flags; pledge of allegiance; penalty for violation

The school committee shall provide for each schoolhouse under its control, which is not otherwise supplied, flags of the United States of silk or bunting not less than two feet long, such flags or bunting to be manufactured in the United States, and suitable apparatus for their display

as hereinafter provided. A flag shall be displayed, weather permitting, on the school building or grounds on every school day and on every legal holiday or day proclaimed by the governor or the President of the United States for especial observance; provided, that on stormy school days, it shall be displayed inside the building. A flag shall be displayed in each assembly hall or other room in each such schoolhouse where the opening exercises on each school day are held. Each teacher at the commencement of the first class of each day in all grades in all public schools shall lead the class in a group recitation of the "Pledge of Allegiance to the Flag". A flag shall be displayed in each classroom in each such schoolhouse. Failure for a period of five consecutive days by the principal or teacher in charge of a school equipped as aforesaid to display the flag as above required, or failure for a period of two consecutive weeks by a teacher to salute the flag and recite said pledge as aforesaid, or to cause the pupils under his charge so to do, shall be punished for every such period by a fine of not more than five dollars. Failure of the committee to equip a school as herein provided shall subject the members thereof to a like penalty.

Miss. Code Ann. § 37-13-7. Pledges of Allegiance to flags

(1) The boards of trustees of the public schools of this state shall require the teachers under their control to have all pupils repeat the oath of allegiance to the flag of the United States of America at least once during each school month, such oath of allegiance being as follows:

"I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one

nation under God, indivisible, with liberty and justice for all."

* * *

Mo. Rev. Stat. § 171.021. Schools receiving public moneys to display United States flag

* * *

2. Every school in this state which is supported in whole or in part by public moneys shall ensure that the Pledge of Allegiance to the flag of the United States of America is recited in at least one scheduled class of every pupil enrolled in that school no less often than once per week. No student shall be required to recite the Pledge of Allegiance.

Mont. Code Ann. § 20-7-133. Pledge of allegiance required – exemption for students and teachers

(1) Except as provided in subsection (4), the pledge of allegiance to the flag of the United States of America must be recited in all public schools of the state.

* * *

(4) A school district shall inform all students and teachers of their right to not participate in recitation of the pledge. Any student or teacher who, for any reason, objects to participating in the pledge exercise must be excused from participation. A student or teacher who declines to participate in the pledge may engage in any alternative form of

conduct so long as that conduct does not materially or substantially disrupt the work or discipline of the school.

* * *

Nev. Rev. Stat. Ann. § 389.040. Patriotic observance

Each public school shall set aside appropriate time at the beginning of each school day for pupils to pledge their allegiance to the flag of the United States. In addition, each public school may set aside appropriate time during the school day for additional patriotic observance.

N.H. Rev. Stat. Ann. § 194:15-c. New Hampshire School Patriot Act.

I. As a continuation of the policy of teaching our country's history to the elementary and secondary pupils of this state, this section shall be known as the New Hampshire School Patriot Act.

II. A school district shall authorize a period of time during the school day for the recitation of the pledge of allegiance. Pupil participation in the recitation of the pledge of allegiance shall be voluntary.

III. Pupils not participating in the recitation of the pledge of allegiance may silently stand or remain seated but shall be required to respect the rights of those pupils electing to participate. If this paragraph shall be declared to be unconstitutional or otherwise invalid, the remaining paragraphs in this section shall not be affected, and shall continue in full force and effect.

N.J. Stat. Ann. § 18A:36-3. Display of and salute to flag; pledge of allegiance

Every board of education shall:

* * *

(c) Require the pupils in each school in the district on every school day to salute the United States flag and repeat the following pledge of allegiance to the flag: "I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all," which salute and pledge of allegiance shall be rendered with the right hand over the heart, except that pupils who have conscientious scruples against such pledge or salute, or are children of accredited representatives of foreign governments to whom the United States government extends diplomatic immunity, shall not be required to render such salute and pledge but shall be required to show full respect to the flag while the pledge is being given merely by standing at attention, the boys removing the headdress.

N.M Stat. Ann. § 22-5-4.5. Pledge of allegiance.

Local school boards shall provide that the pledge of allegiance shall be recited daily in each public school in the school district according to regulations adopted by the state board.

N.Y. Educ. Law § 802. Instruction relating to the flag; holidays

1. It shall be the duty of the commissioner to prepare, for the use of the public schools of the state, a program providing for a salute to the flag and a daily pledge of allegiance to the flag, and instruction in its correct use and display which shall include, as a minimum, specific instruction regarding respect for the flag of the United States of America, its display and use as provided by federal statute and regulation and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such schools. However, such instruction shall include, as a minimum, the provisions of sections one hundred seventy through one hundred seventy-seven of title thirty-six of the United States Code.

* * *

N.C. Gen. Stat. § 115C-47. Powers and duties generally

In addition to the powers and duties designated in G.S. 115C-36, local boards of education shall have the power or duty:

* * *

(29a) To Encourage the Display of the United States and North Carolina Flags, and to Encourage the Recitation of the Pledge or Oath of Allegiance. – Local boards of education are encouraged to adopt policies to (i) provide for the display of the United States and North Carolina flags in each classroom, (ii) provide the opportunity for students to recite the Pledge or Oath of Allegiance on a regular basis, and (iii) provide age-appropriate instruction on the meaning and historical origins of the flag and the Pledge of Allegiance. These policies shall not compel any person to stand, salute the flag, or recite the Pledge of

Allegiance. If flags are donated or are otherwise available, flags shall be displayed in each classroom.

* * *

N.D. Cent. Code § 15.1-19-03.1. Recitation of prayer – Period of silence – Pledge of allegiance.

* * *

4. A school board may authorize the voluntary recitation of the pledge of allegiance by a teacher or one or more students at the beginning of each schoolday. A student may not be required to recite the pledge of allegiance, stand during the recitation of the pledge of allegiance, or salute the American flag.

Ohio Rev. Code Ann. § 3313.602. POLICY ON ORAL RECITATION OF PLEDGE OF ALLEGIANCE TO FLAG; EMPHASIS ON DEMOCRATIC AND ETHICAL PRINCIPLES; VETERANS' DAY OBSERVANCE

(A) The board of education of each city, local, exempted village, and joint vocational school district shall adopt a policy specifying whether or not oral recitation of the pledge of allegiance to the flag shall be a part of the school's program and, if so, establishing a time and manner for the recitation. The policy adopted under this division shall not require any student to participate in the recitation and shall prohibit the intimidation of any student by other students or staff aimed at coercing participation.

* * *

Okla. Stat. Ann. tit. 70, § 24-106. United States flag – Display – Instruction in history and **etiquette** – Pledge of allegiance

* * *

C. Students are authorized to recite, at the beginning of each school day, the pledge of allegiance to the flag of the United States of America as enumerated at 36 U.S.C., Section 172. Each student shall be informed by posting a notice in a conspicuous place that students not wishing to participate in the pledge shall not be required to do so.

Or. Rev. Stat. § 339.875. Procurement, display and salute of flags.

(1) Each district school board shall:

(a) Procure a United States flag and an Oregon State flag of suitable sizes and shall cause such flags to be displayed upon or near each public school building during school hours, except in unsuitable weather, and at such other times as the board deems proper.

(b) Provide students with the opportunity to salute the United States flag at least once each week of the school year by reciting: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all."

(2) Students who do not participate in the salute provided for by this section must maintain a respectful silence during the salute.

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24 Pa. Cons. Stat. Ann. § 7-771. Display of United States flag; development of patriotism

* * *

(c)(1) All supervising officers and teachers in charge of public, private or parochial schools shall cause the Flag of the United States of America to be displayed in every classroom during the hours of each school day and shall provide for the recitation of the Pledge of Allegiance or the national anthem at the beginning of each school day. Students may decline to recite the Pledge of Allegiance and may refrain from saluting the flag on the basis of religious conviction or personal belief. The supervising officer of a school subject to the requirements of this subsection shall provide written notification to the parents or guardian of any student who declines to recite the Pledge of Allegiance or who refrains from saluting the flag.

(2) This subsection shall not apply to any private or parochial school for which the display of the flag, the recitation of the Pledge of Allegiance or the salute of the flag violates the religious conviction on which the school is based.

* * *

R.I. Gen. Laws § 16-22-11. Pledge of allegiance.

(a) All public schools, commencing with preprimary school through and including high school, shall commence each day with the following pledge:

"I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation, under God, indivisible, with liberty and justice for all."

(b) Any person not wishing to participate in the "pledge of allegiance" is exempt from participation and need not participate in the pledge.

S.C. Code Ann. § 59-1-455. Time for pledge of allegiance required.

Beginning with the 1991-92 school year, all public school students, commencing with grades kindergarten through and including high school, shall during the course of each school day's activities at a specific time which must be designated by the local school say the Pledge of Allegiance as follows:

"I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all."

Any person not wishing to say the "Pledge of Allegiance" or otherwise participate in saying the "Pledge of Allegiance" is exempt from participation and may not be penalized for failing to participate.

A person who does not wish to participate may leave the classroom, may remain in his seat, or may express his nonparticipation in any form which does not materially infringe upon the rights of other persons or disrupt school activities.

S.D. Codified Laws Ann. § 13-24-17.2. Right to post flag, recite pledge of allegiance and sing national anthem not to be infringed.

The right to post the United States flag shall not be limited or infringed upon in any public school classroom, public school building, at any public school event, or on any public school uniform. The right to recite the pledge of allegiance to the flag of the United States shall not be limited or infringed upon, and the national anthem may be sung during any school day or school event.

Tenn. Code Ann. § 49-6-1001. American flag and emblems

* * *

(c)(1) Each board of education shall require the daily recitation of the pledge of allegiance in each classroom in the school system in which a flag is displayed. Each LEA is encouraged to have a flag in each classroom and patriotic, fraternal, and other orga~izations or individuals are encouraged to donate flags to schools to enable them to have the flag of the United States of American present in each classroom. Each board of education shall determine the appropriate time during the school day for the recitation of the pledge of allegiance. At the time designated for the recitation of the pledge of allegiance, students shall stand and recite the pledge of allegiance while facing the flag with their right hands over their hearts or in an appropriate salute if in uniform; provided, however, that no student shall be compelled to recite the pledge of allegiance if the student or the student's parent or legal guardian objects on religious, philosophical or other grounds to the student participating in such exercise. Students who are thus exempt from reciting the pledge of allegiance shall remain quietly standing or sitting at their desks while others recite the pledge of allegiance and shall make no display that disrupts or distracts others who are

reciting the pledge of allegiance. Teachers or other school staff who have religious, philosophical, or other grounds for objecting are likewise exempt from leading or participating in the exercise. If a teacher chooses not to lead the pledge, another suitable person shall be designated either by the teacher or principal to lead the class. Each board of education shall provide appropriate accommodations for students, teachers or other staff who are unable to comply with the procedures described herein due to disability.

* * *

Utah Code Ann. § 53A-13-101.6. Instruction on the flag of the United States of America.

* * *

(3)(a) The pledge of allegiance to the flag shall be recited at the beginning of the day in each elementary public school in the state.

(b) Local school boards are encouraged to provide for the reciting of the pledge of allegiance to the flag once a week at the beginning of a school day in their secondary schools.

* * *

Va. Code Ann. § 22.1-202. Instruction in history and principles of flags of United States and Virginia; pledge of allegiance to American flag; guidelines developed by the Board

* * *

C. Each school board shall require the daily recitation of the Pledge of Allegiance in each classroom of the school division and shall ensure that the flag of the United States is in place in each such classroom. Each school board shall determine the appropriate time during the school day for the recitation of the Pledge. During such Pledge of Allegiance, students shall stand and recite the Pledge while facing the flag with their right hands over their hearts or in an appropriate salute if in uniform; however, no student shall be compelled to recite the Pledge if he, his parent or legal guardian objects on religious, philosophical or other grounds to his participating in this exercise. Students who are thus exempt from reciting the Pledge shall remain quietly standing or sitting at their desks while others recite the Pledge and shall make no display that disrupts or distracts others who are reciting the Pledge. School boards shall provide appropriate accommodations for students who are unable to comply with the procedures described herein due to disability.

The school board's code of conduct shall apply to disruptive behavior during the recitation of the Pledge in the same manner as provided for other circumstances of such behavior.

Wash. Rev. Code Ann. § 28A.230.140. United States flag – Procurement, display, exercises – National anthem

The board of directors of every school district shall cause a United States flag being in good condition to be displayed during school hours upon or near every public school plant, except during inclement weather. They shall cause appropriate flag exercises to be held in each classroom at the beginning of the school day, and in every

school at the opening of all school assemblies, at which exercises those pupils so desiring shall recite the following salute to the flag: "I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all". Students not reciting the pledge shall maintain a respectful silence. The salute to the flag or the national anthem shall be rendered immediately preceding interschool events when feasible.

W. Va. Code § 18-5-15b. Pledge of allegiance to the flag

Every instructional day in the public schools of this state shall be commenced with a pledge of allegiance to the flag of the United States. Pupils who do not wish to participate in this exercise shall be excused from making such pledge.

Wis. Stat. Ann. § 118.06. Flag, pledge of allegiance, and national anthem

* * *

(2) Every public school shall offer the pledge of allegiance or the national anthem in grades one to 12 each school day. Every private school shall offer the pledge of allegiance or the national anthem in grades one to 12 each school day unless the governing body of the private school determines that the requirement conflicts with the school's religious doctrines. No pupil may be compelled, against the pupil's objections or those of the pupil's parents or guardian, to recite the pledge or to sing the anthem.

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(10) (8)

Nos. 02-1574 and 02-1624

Supreme Court, U.S.
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In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL A. NEWDOW, ET AL.,

Respondents.

ELK GROVE UNIFIED SCHOOL DISTRICT
and DAVID GORDON, Superintendent, EGUSD,

Petitioners,

v.

MICHAEL A. NEWDOW,

Respondent.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND, ALABAMA ASSOCIATION OF SCHOOL BOARDS, ARIZONA SCHOOL BOARDS ASSOCIATION, ARKANSAS SCHOOL BOARDS ASSOCIATION, IDAHO SCHOOL BOARDS ASSOCIATION, KENTUCKY SCHOOL BOARDS ASSOCIATION, LOUISIANA SCHOOL BOARDS ASSOCIATION, MISSOURI SCHOOL BOARDS ASSOCIATION, NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, AND OHIO SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are nonprofit associations of public school boards dedicated to the support and improvement of the public schools and the enhancement of student achievement. Collectively, Amici represent more than 2,300 public school boards that are directly responsible for the education of more than six million students.

Texas Association of School Boards Legal Assistance Fund. Nearly 800 Texas public school districts are members of the Texas Association of School Boards Legal Assistance Fund. The Legal Assistance Fund is governed by three organizations: the Texas Association of School Boards, the Texas Association of School Administrators, and the Texas Council of School Attorneys. The Texas Association of School Boards is a nonprofit, unincorporated association of the public school districts of the State of Texas. Approximately 1,045 public school districts, through their elected boards of trustees, are TASB members. TASB assists school boards by providing leadership, educational materials, technical services, and legislative and policy services. The Texas Association of School Administrators represents the state's school superintendents and other administrators responsible for carrying out the education policies adopted by their local boards of trustees. Texas' Council of School Attorneys is composed of

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[1] The parties' written consent to the filing of this brief has been filed with the Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the amici curiae and their counsel made any monetary contribution to the preparation or submission of this brief.

attorneys who represent more than 90 percent of the school districts in Texas.

Alabama Association of School Boards. The Alabama Association of School Boards represents the interests of Alabama's city and county boards of education. The AASB was established in 1949 as a voluntary membership organization. In 1955, the Legislature recognized the AASB as "the organization and representative agency of the members of the school boards of Alabama." Ala. Code § 16-1-6 (1975). Although the AASB is a voluntary membership organization, every local public school board in the State is an AASB member. In fulfilling its purpose, the AASB promotes and supports the interests of its member boards of education on a variety of legal and educational issues.

Arizona School Boards Association. The Arizona School Boards Association is a nonprofit, nonpartisan organization representing more than 225 public school districts. The organization provides numerous resources for local governing boards, including ongoing training and educational materials for the promotion of student achievement. Its vision for students includes conveying to students the importance of fulfilling one's potential, contributing to the community, participating in the democratic process, and continuing to learn throughout life.

Arkansas School Boards Association. The Arkansas School Boards Association is a nonprofit organization whose members include more than 300 local school boards. ASBA believes that a program of public education is not something that just happens but, rather, is something that must be planned, financed, and administered by school board members, administrators, and educators dedicated to the goal of student achievement. The ASBA serves its

members through educational programs, training, and policy development.

Idaho School Boards Association. The membership of the Idaho School Boards Association, Inc., consists of school board trustees elected throughout the state of Idaho. ISBA is dedicated to the advancement of education through the promotion of public understanding of the role of local school boards and school board members. In addition, ISBA endeavors to work for adequate and equitable financing of public schools and to study, interpret, propose and influence legislation that may affect education in the state of Idaho.

Kentucky School Boards Association. The Kentucky School Boards Association provides advocacy, consultation, information, professional development, and district support services to school board members as well as district and school staff. KSBA is a nonprofit service organization composed of almost 900 members of local boards of education. KSBA's strategic objectives include ensuring that every board will govern effectively and with integrity and that every board member will understand and emphasize student achievement.

Louisiana School Boards Association. The Louisiana School Boards Association is a nonprofit, unincorporated association of all the public school systems in Louisiana. The mission of the LSBA is to provide technical assistance to the state's school boards so that they may provide a high quality education to the state's school children.

Missouri School Boards Association. The Missouri School Boards Association is a statewide, nonprofit organization representing local school boards who are charged

with shaping the educational programs of the public school students of Missouri. The MSBA's mission is to assist school boards and enhance student achievement by providing leadership, training, educational materials, and technical services.

North Carolina School Boards Association. The North Carolina School Boards Association is a voluntary membership organization representing all 117 local boards of education in the State of North Carolina. Many of NCSBA's members regularly require students to recite the Pledge of Allegiance. All NCSBA's members have a strong interest in having a definitive Supreme Court ruling on the constitutionality of the Pledge in its current form so that they can avoid potential litigation in the event they choose to have students recite it.

Ohio School Boards Association. The Ohio School Boards Association is a statewide nonprofit organization of public school boards. Membership in OSBA is open to all public school boards, and 100 percent of the board members in the various city, exempted village, local, and joint vocational school districts throughout the State of Ohio (662 in all) are currently members of OSBA, as are all of the governing boards of Ohio's 60 educational service centers. The mission of OSBA is to unite boards of education and to provide information, services, and representation to its members.

SUMMARY OF ARGUMENT

The nation's public schools need this Court's guidance regarding the constitutionality of the recitation of the

Pledge of Allegiance in public schools. Although inapplicable to schools outside the Ninth Circuit, the *Newdow* decision has cast a long shadow of uncertainty in circuits without controlling authority regarding recitation of the Pledge. These school districts face a real dilemma: do they follow their state's laws regarding voluntary recitation of the Pledge or do they run the risk of being sued for allowing the Pledge? The dilemma is more than theoretical. After the original *Newdow* ruling, yet another lawsuit was filed regarding recitation of the Pledge, and an appeal is now pending in the Fourth Circuit. Because of public interest in this matter, future litigation on this issue, circuit by circuit, is virtually assured. Guidance from this Court is needed to end the debate (and litigation) regarding the Pledge.

The *Newdow* decision also is worthy of this Court's review because it intrudes upon the public schools' historically honored role in setting curriculum and invites further litigation over classroom use of historical materials that refer to religion. State curriculum models from states as varied as California, Kentucky, and Pennsylvania show that the Pledge of Allegiance is part of a larger program of civics education and is used as a tool to lay a foundation for later, more complex learning about citizenship, equality, freedom, and responsibility. The court of appeals erred in isolating the Pledge from the larger academic context in which the Pledge is used.

The court of appeals apparently attempted to narrow the effect of its ruling by stating that the Pledge is a "performative" statement that requires students to affirm a belief. To the extent that the court of appeals' argument rests on a particular student being forced to recite the Pledge, the argument is without weight because no

student is required to recite the Pledge. The argument seems to rest on a belief that hearing *other* students recite a performative statement has an effect that hearing those same students recite, for example, the words "We hold these truths to be self-evident" does not. The study of historical documents involves more than a passive review of the past, but, rather, involves active learning and the inculcation of the values contained in the documents. Inspirational documents such as the Declaration of Independence may not be "performative" as a grammatical matter, but it is unclear why the court of appeals assumed that their recitation would have less effect on students than the recitation of the Pledge.

Granting review in this case, and reversing the Ninth Circuit, will not require this Court to tread into uncharted territory or to revisit the school prayer cases. It will merely reaffirm the right of public schools to instill patriotic virtue and to teach civics in a manner that accurately reflects the heritage of the United States, without fear of constant challenges in the courts.

ARGUMENT

I. The nation's public schools need this Court's guidance regarding the constitutionality of the recitation of the Pledge of Allegiance.

A majority of states maintain statutes that either require or encourage schools to have regular recitations of

the Pledge of Allegiance.[2] Ten of these states are located in circuits where the federal courts have ruled on the constitutionality of the Pledge. Although inapplicable to schools outside the Ninth Circuit, the *Newdow* decision has cast a long shadow of uncertainty in circuits without controlling authority regarding recitation of the Pledge. Schools in these states face a dilemma: do they ignore the instructions of their state legislatures or do they run the risk of being sued for permitting the recitation of the Pledge of Allegiance? Even in states where the recital of the Pledge is optional rather than a statutory mandate, educators

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[2] ALA. CODE § 16-43-5 (2003); ALASKA STAT. § 14.03.130 (Michie 2003); ARIZ. REV. STAT. § 15-506 (2003); CAL. EDUC. CODE § 52720 (Deering 2003); CONN. GEN. STAT. ANN. § 10-230 (West 2002); DEL. CODE ANN. tit. 14, § 4105 (2002); FLA. STAT. ANN. § 1003.44 (West Supp. 2003); GA. CODE ANN. § 20-2-310 (2003); IDAHO CODE § 33-1602 (Michie 2002); 105 ILL. COMP. STAT. ANN. § 5/27-3 (West 2003); KAN. STAT. ANN. § 72-5308 (2002); KY. REV. STAT. ANN. § 158.175 (Banks-Baldwin 2003); LA. REV. STAT. ANN. § 17:2115 (West 2001); MD. CODE ANN., EDUC. § 7-105 (2002); MASS. GEN. LAWS ANN. ch. 71, § 69 (West Supp. 2003); MISS. CODE ANN. § 37-13-6 (Supp. 2002); MO. REV. STAT. § 171.021 (2003); MONT. CODE ANN. § 20-7-133 (2002); NEV. REV. STAT. ANN. 389.040 (Michie 2003); N.H. REV. STAT. ANN. § 194:15-c (2003); N.J. STAT. ANN. § 18A:36-3 (West 2003); N.M. STAT. ANN. § 22-5-4.5 (Michie 2002); N.Y. EDUC. LAW § 802 (McKinney 2000); N.C. GEN. STAT. § 115C-47 (2002); N.D. CENT. CODE § 15.1-19-03.1 (2001); OKLA. STAT. ANN. tit. 70, § 24-106 (West Supp. 2003); OR. REV. STAT. § 339.875 (2001); 24 PA. CONS. STAT. ANN. § 7-771 (West Supp. 2003); R.I. GEN. LAWS § 16-22-11 (2002); S.C. CODE ANN. § 59-1-455 (Law. Co-op. 2002); TENN. CODE ANN. § 49-6-1001 (2003); UTAH CODE ANN. § 53A-13-101.6 (2003); VA. CODE ANN. § 22.1-202 (Michie 2003); WASH. REV. CODE ANN. § 28A.230.140 (West 2003); W. VA. CODE ANN. § 18-5-15b (Michie 2003); WIS. STAT. § 118.06 (2002).

On May 28, 2003, Texas joined these states when its governor signed a bill requiring that the pledge be recited in public schools beginning September 1, 2003. *See* S.B. 83, 78th Reg. Sess. (Tex. 2003) (amending Section 25.082 of the Texas Education Code).

now must question whether voluntary recital of the Pledge is a constitutional choice for their schools.

The dilemma is more than theoretical. After the first ruling in *Newdow*, a school district in Virginia was sued over its requirement that the pledge be recited daily, and an appeal is now pending in the Fourth Circuit.[3] Given the regularity with which public schools are sued over matters touching on religion, future litigation on this particular issue, circuit by circuit, is virtually assured.[4] Any school located within a circuit that has not yet ruled on the matter will be without guidance until litigation is brought in its circuit. The cost of First Amendment litigation to the public schools, at least with respect to attorneys' fees, can be enormous.[5] Guidance from this Court is needed to end the debate (and litigation) regarding the Pledge and to provide assurance to the nation's schools that their authority in matters of pedagogy remains intact.

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[3] *Myers v. Loudoun County Sch. Bd.*, 251 F. Supp. 2d 1262 (E.D. Va. 2003). Although the plaintiffs in *Myers* pressed a somewhat different argument than that pressed by Mr. Newdow in the case below, the case was based on a claim that recitations of the pledge violated the Establishment Clause.

[4] This Court's decisions regarding vouchers, student prayer, and school aid, and its decision to review a religious studies funding case, are but a few recent examples of First Amendment litigation directly impacting the schools. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (vouchers); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (student prayer); *Mitchell v. Helms*, 530 U.S. 793 (2000) (school aid); *Locke v. Davey*, 299 F.3d 748 (9th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3721 (U.S. May 19, 2003) (funding for religious studies).

[5] *See, e.g.*, *Santa Fe District to Pay Lawyers in School Prayer Case $250,000*, HOUS. CHRON., May 10, 2001, at A46 (discussing award of fees to prevailing plaintiff in prayer case).

II. The Pledge of Allegiance is a historically accurate acknowledgement of history, values, and patriotism and is properly part of a secular social studies program.

A. State curriculum models show that the Pledge of Allegiance is used as a tool for introducing basic concepts of citizenship and democratic values to students.

The Pledge of Allegiance serves two interrelated functions in our system of education: ceremonial and pedagogical. The ceremonial function serves the secular purpose of "expressing confidence in the future and encouraging recognition of what is worthy of appreciation in society." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring) (internal quotation marks omitted). Although "the symbolic and cultural side of schools is too often viewed as 'soft' or as a superficial afterthought," learning is fostered in large part "by strong traditions, frequent ritual, and poignant ceremonies to reinvigorate cultural cohesion and focus." TERENCE E. DEAL & KENT D. PETERSON, SHAPING SCHOOL CULTURE: THE HEART OF LEADERSHIP 10, 32 (Jossey-Bass 1999); *see also* THOMAS SERGIOVANNI, MORAL LEADERSHIP: GETTING TO THE HEART OF SCHOOL IMPROVEMENT 99 (Jossey-Bass 1992) (noting general research establishing link between school effectiveness and school culture). Classrooms contain children of enormous diversity in language, culture, family background, and readiness for learning. More than just a throwaway moment after the ringing of the morning bell, the Pledge of Allegiance represents an opportunity for a classroom of children to reflect on a common purpose and national identity.

The Pledge also serves as an important tool for introducing basic concepts of citizenship to children. The founders viewed education of children and inculcation of democratic values as essential to the survival of the nation.[6] This Court, time and again, has recognized that the fundamental purpose of the public schools is to prepare children for their role in society. *See, e.g.*, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) ("[P]ublic education must prepare pupils for citizenship in the Republic. . . ."); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (confirming the authority of the state to require that children attend school, either public or private, and to require that teachers be "of good moral character and patriotic disposition"). For example, in *Ambach v. Norwick*, 441 U.S. 68 (1979), in which the Court upheld a state statute forbidding certification of teachers unless they were citizens or had agreed to apply for citizenship, the Court again acknowledged the importance of public schools "in the preparation of individuals for

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[6] *See generally* LORRAINE PANGLE & THOMAS PANGLE, THE LEARNING OF LIBERTY: THE EDUCATIONAL IDEAS OF THE AMERICAN FOUNDERS 75, 93, 96, 106-117, 125, 144, 194 (University Press of Kansas 1993) (summarizing perspectives on education espoused by Franklin, Jefferson, Adams, Rush, Webster, and others); WALTER BERNS, MAKING PATRIOTS 65 (University of Chicago Press 2001) ("Inculcation of love of country, like moral education generally, takes place" at an early age, which is why Jefferson proposed that the young be educated at public expense; education would render them " 'worthy to receive, and able to guard the sacred deposit of the rights and liberties of their fellow citizens' "); DORIANE LAMBELET COLEMAN, FIXING COLUMBINE: THE CHALLENGE TO AMERICAN LIBERALISM 147-50 (Carolina Academic Press 2002) (explaining that Franklin, Rush, Jefferson and others argued that the success of the democratic experiment rested on some version of a universal system of public education that would emphasize knowledge and virtue).

participation as citizens, and in the preservation of the values on which our society rests." *Id.* at 76. Education is "perhaps the most important function" of local government and provides the "very foundation of good citizenship" and of awakening children to cultural values. *Id.* at 76-77 (citing *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954)).

Children, of course, do not show up on the first day of kindergarten ready to absorb John Locke's theory of natural rights. The classic curriculum model is one that introduces age-appropriate information and concepts and builds upon them year after year. *See generally* PETER SENGE ET AL., SCHOOLS THAT LEARN 154-65 (Doubleday 2000) (reviewing literature regarding the cognitive development of children and explaining how children in the lower primary grades transition from thinking about their families and friends to thinking about their communities and the world around them).

The state-approved curricula for states as varied as California, Kentucky, New York, Pennsylvania, and Texas show that concepts such as citizenship and freedom are introduced to elementary-age children through the study and recognition of symbols, customs, landmarks, songs, and celebrations.[7] In these states and elsewhere, the

[7] *See* CALIFORNIA BOARD OF EDUCATION, HISTORY-SOCIAL SCIENCE CONTENT STANDARDS FOR CALIFORNIA PUBLIC SCHOOLS: KINDERGARTEN THROUGH GRADE TWELVE 3, 6, 10 (1998) *available at* http://www.cde.ca.gov/cdepress/Hist_SocSci_Stnd.pdf; KENTUCKY DEPARTMENT OF EDUCATION, CORE CONTENT FOR SOCIAL STUDIES ASSESSMENT, Standard SS-E-5.2.5 (1999) *available at* http://www.kde.state.ky.us/KDE/Instructional+Resources/Curriculum+Documents+and+Resources/Core+Content+for+Assessment.htm; NEW YORK DEPARTMENT OF EDUCATION, LEARNING STANDARDS FOR SOCIAL STUDIES 25-26, Standard 5

(Continued on following page)

Pledge of Allegiance is part of a larger program designed to teach history and government.[8] It is used to lay a foundation for later, more complex learning about the ideas contained within the Pledge. As their critical thinking skills grow, students examine the political, religious, and economic ideas and interests that brought about the American Revolution, and they study in detail the concepts in the Declaration of Independence and Constitution,

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(1996) *available at http://www.emsc.nysed.gov/ciai/socst/pub/sslearn.pdf*; PENNSYLVANIA DEPARTMENT OF EDUCATION, ACADEMIC STANDARDS FOR HISTORY, 22 PA. CODE, Chapter 4, Appendix C, Standards 5.1.3(G) and (K) (1999); TEXAS EDUCATION AGENCY, TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR SOCIAL STUDIES, 19 TEX. ADMIN. CODE § 113.2(b)(10), § 113.3 (b)(13) (West 2003).

[8] *See, e.g.*, CALIFORNIA CONTENT STANDARDS, *supra* note 7, 6 (stating that students will learn about the Pledge and other symbols and traditions "that provide continuity and a sense of community across time"); KENTUCKY CORE CONTENT FOR SOCIAL STUDIES ASSESSMENT, *supra* note 7, Standards SS-E-5.2.2 and 5.2.5 (stating that students will learn about symbols, "patriotic songs, poems (*e.g.*, Pledge of Allegiance)" and will learn about "ideals of equality and personal liberty"); NEW YORK LEARNING STANDARDS FOR SOCIAL STUDIES, *supra* note 7, at 25-26, Standard 5 (stating that students will learn "basic principles" of the Declaration of Independence and Constitution and indicating that these objectives will have been realized when, for example, students "understand the significance" of the Pledge); PENNSYLVANIA ACADEMIC STANDARDS FOR HISTORY, *supra* note 7, Standards 5.1.3(G), (J), and (K) (stating that students will learn to "[d]escribe the purpose" of the flag, Pledge of Allegiance, and national anthem as well as learn "the importance of respect for" the "opinions of others"); TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR SOCIAL STUDIES, *supra* note 7, § 113.3(b)(12), (13) (stating that students will learn how symbols and customs "contribute to our national identity," explain the meaning of the Pledge of Allegiance, and explain how selected symbols and customs "reflect an American love of individualism, inventiveness, and freedom.").

including the valuable role of freedom of conscience and the protection of minority viewpoints.[9]

The Pledge of Allegiance is a historically accurate acknowledgement of history, values, and patriotism. It is properly part of a larger program of citizenship training. The court of appeals' decision ignores these important secular goals, undercuts the authority of educators in developing social studies curricula, and sets the stage for further litigation regarding local curriculum choices.

B. The decision below intrudes upon the public schools' historically honored role in setting curriculum, and it invites litigation over school activities and classroom lessons that refer to the role of religion in American history.

Numerous states have determined that the Pledge of Allegiance is a useful component of teaching students civics and American history as well as a ritual that enhances school culture. So long as constitutional restrictions are honored, it "is not the business of this Court to gainsay the judgments of experts on matters of pedagogy." *School District of Abington Township v. Schempp*, 374 U.S. 203, 279 (1963) (Brennan, J., concurring). Mr. Newdow's challenge is only one in a long line of challenges brought by parents to schools' curricular choices. Although these

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[9] *See, e.g.*, CALIFORNIA CONTENT STANDARDS, *supra* note 7, at 5, 6, 16, 18, 33, 34; NEW YORK LEARNING STANDARDS, *supra* note 7, 25-29, Standard 5; TEXAS ESSENTIAL KNOWLEDGE AND SKILLS, *supra* note 7, § 113.7(b)(2)-(3) & (15)-(21), § 113.24(b)(2)-(4), (16)-(26), § 113.35(b)(14)-(17).

challenges are seldom successful, litigation has been steady during the past two decades, with challenges to programs and teaching materials used in civic education, literature, biology, and health and sex education.[10] Courts faced with these challenges have properly recognized that schools must be free to make these choices if they are to fulfill their functions of educating students in knowledge and of instilling civic virtue.[11]

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[10] *See, e.g.*, *PLANS, Inc. v. Sacramento City Unified Sch. Dist.*, 319 F.3d 504 (9th Cir. 2003) (challenging entire educational program); *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49 (2nd Cir.), *cert. denied*, 534 U.S. 827 (2001) (challenging several activities including Earth Day celebrations and poetry from Shel Silverstein's *Where the Sidewalk Ends*); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995) (objecting to AIDS and sex education program); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994) (teacher challenging requirement that he teach evolution); *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994) (challenging supplemental reading program for grades kindergarten through five); *Smith v. Board of Sch. Comm'rs*, 827 F.2d 684 (11th Cir. 1987) (challenging use of elementary and secondary school textbooks in the areas of history, social studies, and home economics); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (challenging reading textbooks for grades one through eight); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985) (challenging novel assigned in tenth grade English class); *Leebaert ex rel. Leebaert v. Harrington*, 193 F. Supp. 2d 491 (D. Conn. 2002) (challenging health education curriculum); *Grimes v. Cavazos*, 786 F. Supp. 1184 (S.D.N.Y. 1992) (challenging curriculum as "culturally biased").

Most of these challenges were based on the *lack* of religious content (*i.e.*, allegations that the school was endorsing "secular humanism") or parental disagreement with the values and ideas included in the school's curriculum. *See, e.g.*, *Fleischfresser*, 15 F.3d at 683; *Smith*, 827 F.2d at 688.

[11] *See, e.g.*, *Brown*, 68 F.3d at 534 ("If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for

(Continued on following page)

The decision below invites new challenges to schools' curricular decisions. Although it is undisputed that religion has played an important role in this nation's history,[12] and although this Court has recognized that information about religion may be "integrated into the school curriculum,"[13] many teachers now will have to think twice when deciding how best to present a wide range of historical materials that necessarily acknowledge the belief, not only of the founders but also of many of America's later leaders, that the United States was a nation "brought forth under God." In New York, for example, where students learn about the "basic ideals of American democracy" by

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each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state education systems. . . ."); *Fleischfresser*, 15 F.3d at 686 ("We are also mindful, however, that this heightened concern [about violations of the Establishment Clause in schools] is balanced to a great degree by the broad discretion of a school board to select its public school curriculum."); *see also McCollum v. Board of Educ.*, 333 U.S. 203, 235 (1948) (Jackson, J., concurring) ("If we are to eliminate everything that is objectionable to any [religious group] or inconsistent with any of their doctrines, we will leave public schools in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.").

[12] *See, e.g., Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (stating that our nation's "institutions presuppose a Supreme Being"); *see also* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 292-93 (George Lawrence trans., HarperPerennial 1988) (observing that the early Americans viewed religion as "necessary to the maintenance of republican institutions").

[13] *Stone v. Graham*, 449 U.S. 39, 42 (1980) (citation omitted); *see also School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963) ("Nothing we have said" indicates that the study of religion, "when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.").

studying both the Gettysburg Address and Martin Luther King's "I Have a Dream" speech,[14] is classroom recitation permitted as to King's words but now forbidden as to Lincoln's? The long shadow of the *Newdow* decision creates a new source of uncertainty and anxiety for classroom teachers.

The beliefs of those who founded this country necessarily suffuse their deeds and words, from the Mayflower Compact to the Declaration of Independence through the Gettysburg Address. Historical accuracy, in combination with the secular purpose of instilling patriotism, must permit public schools to acknowledge the religious heritage of the country without violating the Establishment Clause. Indeed, *not* acknowledging the role of religion would result in "a distorted impression about the place of religion in our national life." *Newdow v. U.S. Congress*, 2003 WL 21003832 *14 (9th Cir. 2003) (O'Scannlain, J., dissenting from the denial of rehearing en banc.) Yet the decision below could be read to require such a result.

C. The court of appeals' "performative" distinction does not withstand scrutiny.

The court of appeals apparently attempted to minimize the impact of its ruling by distinguishing the Pledge as a "performative" statement that requires students to affirm a belief. To the extent that the court of appeals' argument rests on a particular student being forced to recite the Pledge, it is, of course, without weight because no student is required to recite the Pledge. The argument

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[14] NEW YORK LEARNING STANDARDS, *supra* note 7, at 2.

seems to rest, therefore, on a belief that hearing *other* students recite a performative statement has an effect that hearing those same students recite, for example, the words "We hold these truths to be self-evident" does not. The court of appeals, however, did not explain the basis for this apparent conclusion.

The court contrasted the reading of the Declaration of Independence and similar works as merely passive, as if the study of historical texts were merely a dry exercise for the edification of civics teachers. As a preliminary matter, the court of appeals' suggestion that the review of documents is saved by the passivity of the exercise is simply inconsistent with prior holdings of this Court. *See, e.g., Stone v. Graham*, 449 U.S. 39, 42 (1980) (stating that the fact that copies of the Ten Commandments were "merely" posted in schools rather than read aloud was immaterial; practice was unconstitutional because the practice served no legitimate secular purpose). Even more importantly, the foundational documents of our government are not "merely" reviewed, as suggested by the court of appeals, but are taught as documents that must be understood and revered. The reading or recitation of such documents as part of classroom assignments or school programs involves both active learning and the promotion of patriotism and citizenship. Indeed, the Declaration of Independence itself was written to be read aloud. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 342 (Knopf 1996) ("Unlike the Declaration of Independence, which Jefferson (we now know) wrote to be read aloud, literally performed, the prosaic text of the Constitution was best read silently, not for inspiration, but for direction").

In short, although inspirational documents such as the Declaration of Independence and the Gettysburg Address may not be "performative" as a grammatical matter, it is unclear why the court of appeals assumed that their recitation would have less effect on students than the recitation of the Pledge. Nor is it clear why it assumed that this difference was enough to constitutionally condemn the recitation of one but not the others.

D. The court of appeals erred in isolating the Pledge from the larger academic context in which the Pledge is used.

The "practical message" of the Pledge is an appreciation of the political ideologies on which the country was founded. *Myers v. Loudoun County School Board*, 251 F. Supp. 2d 1262, 1269 (E.D. Va. 2003). In analyzing the Pledge of Allegiance, the court of appeals erred by isolating the phrase "under God" from the remainder of the Pledge, and it erred again in isolating the Pledge from the larger academic context in which the Pledge is used. The Pledge cannot be viewed in a vacuum apart from other lessons conveyed to students, lessons in which students learn about the historical conditions that led Jefferson, Madison, and others to create a government and cultural environment where people of strong belief and no belief are equal under the law.[15] They learn how America became "what no other country had ever been . . . a 'haven for all sorts and conditions of men.'. . . " WALTER BERNS, MAKING

[15] *See, e.g.*, CALIFORNIA CONTENT STANDARDS, *supra* note 7, at 16, 18, 33, 34; TEXAS ESSENTIAL KNOWLEDGE & SKILLS, *supra* note 7, § 113.7(b)(2)-(3) & (15)-(21), § 113.24(b)(16), (24), § 113.35(b)(14)-(17).

PATRIOTS 30-32 (University of Chicago Press 2001). The Pledge may play but one part in contributing to these larger curricular and patriotic objectives, but it is one that is worthy of preservation.

Against this backdrop, it is "obvious," to quote Judge Fernandez's dissent,[16] that the Pledge of Allegiance neither establishes religion nor interferes with anyone's free exercise rights. Granting review in this case, and reversing the Ninth Circuit, will not require this Court to tread into uncharted territory or to revisit the school prayer cases. It will merely reaffirm the right of public schools to instill patriotism and to teach civics in a manner that reflects the heritage of the United States, without fear of constant challenges in the courts.

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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[16] *Newdow*, 2003 WL 21003832 *24 (Fernandez, J., dissenting).

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In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL A. NEWDOW, *et al.*,

Respondents.

and

ELK GROVE UNIFIED SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

MICHAEL A. NEWDOW,

Respondent.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR GRAY DAVIS, GOVERNOR OF THE STATE OF CALIFORNIA, AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS UNITED STATES OF AMERICA AND ELK GROVE UNIFIED SCHOOL DISTRICT

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QUESTIONS PRESENTED

Governor Davis adopts the questions presented from the petitions for writ of certiorari filed by the United States of America and the Elk Grove Unified School District in this matter.

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INTEREST OF AMICUS CURIAE[1]

A primary purpose of education in California is to train school children in good citizenship, patriotism and loyalty to the state and the nation as a means of protecting the public welfare. Cal. Educ. Code § 233.5; *In re Shinn*, 195 Cal.App.2d 683, 686 (1961). California courts have recognized that the Pledge of Allegiance, with its reference to God, is part of our national culture. See *Sands v. Morongo Unified Sch. Dist.*, 53 Cal.3d 863, 917 n.1 (1991). Indeed, relying on this Court's precedent, California's courts long ago declined to excuse a student from compliance with a general and neutral requirement to say the Pledge, based on a religious objection. *Gabrielli v. Knickerbocker*, 12 Cal.2d 85 (1938), *app. dismissed, cert. denied*, 306 U.S. 621 (1939).

Governor Davis is the chief executive officer of the State of California, charged with the obligation to see that the law is faithfully executed. Cal. Const., art. V, § 1. California law requires that a daily patriotic exercise be conducted in elementary and secondary school classrooms, noting explicitly that recitation of the Pledge of Allegiance will satisfy that requirement. Cal. Educ. Code § 52720. Indeed, petitioner Elk Grove Unified School District implemented this statute by enacting a policy allowing students to participate voluntarily in daily teacher-led recitations of the Pledge. The Ninth Circuit's decision

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae or his counsel made a monetary contribution to the preparation and submission of this brief.

effectively invalidates a portion of § 52720, precluding Elk Grove School District and every other school district in California from complying with the statute's requirements by reciting the Pledge of Allegiance.

Governor Davis respectfully submits this brief in furtherance of his state constitutional duty to ensure implementation of California's policy of encouraging voluntary, group recitation of the Pledge of Allegiance in public school classrooms.

SUMMARY OF ARGUMENT

There can be little doubt that the question whether school districts may lawfully offer group recitation of the Pledge of Allegiance to the Flag, for voluntary recitation by school children, presents an issue of national cultural and social importance. Review of the Ninth Circuit's decision in this case is warranted for that reason alone, so that California schools may freely offer the Pledge of Allegiance as a daily expression of patriotism and national unity.

Review is also warranted because the Ninth Circuit's characterization of the school district's daily patriotic recitation of the Pledge of Allegiance as a "coerced religious act" ignores this Court's prior recognition that, despite its religious reference, the Pledge of Allegiance is today an essentially secular exercise, deeply rooted in American culture and history. The fact that some students may personally find the phrase "under God" to be offensive to their religious beliefs should not be a basis for empowering the offended students to deprive other students of the opportunity to join with their classmates in what should

properly be considered a secular group expression of American loyalty and unity.

Finally, the petitions for certiorari should be granted because the holding of the Ninth Circuit conflicts with the decision of the Seventh Circuit, and the issues presented by the petitions require a uniform, national rule.

ARGUMENT

I. Review is necessary to clarify that, for the public welfare, California is free to offer daily recitation of the Pledge of Allegiance in classrooms as a patriotic exercise for students, so long as participation by individual students is voluntary.

California Education Code § 52720 requires daily appropriate patriotic exercises in public elementary schools, and further provides that the recitation of the Pledge satisfies this requirement. The Ninth Circuit's amended opinion casts unwarranted doubt on the constitutionality of the California statute. Although the Court of Appeals declined to decide plaintiff's request for declaratory relief as to both the constitutionality of the Pledge and the California statute, U.S. App. 6a and 18a, its decision necessarily implicates the constitutionality of both. Review is warranted to dispel any notion that the patriotic exercise authorized by California law amounts to a coerced religious act.

In acknowledging the unbroken history of official references to the role of religion in American public life from at least 1789, this Court noted that the Pledge "is recited by thousands of public school children – and adults

– every year." *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984). It is California's policy to honor that heritage and tradition. To now preclude recitation of the Pledge in classrooms, because a two-word phrase therein has religious significance for a student's parent, ignores the Pledge's predominant value in teaching children traditional lessons of patriotism and unity.

If the "Pledge of Allegiance to the Flag" that includes the phrase "under God" may no longer be offered to students in the classroom, then no official pledge of allegiance exists that may presently be offered to students as a patriotic expression of loyalty in unity with other Americans. To be sure, California school districts might substitute a hybrid "pledge" as a patriotic exercise, omitting the phrase "under God." But then, of course, it would not be the *Nation's* Pledge of Allegiance to the Flag that would be recited, but rather a California *version* of that Pledge. The only "Pledge of Allegiance to the Flag" that officially and nationally expresses Americans' loyalty is the Pledge as defined by Congress. 4 U.S.C. § 4.

Review of the Ninth Circuit opinion is, therefore, necessary to confirm that California public schools act consistently with the Constitution when they start the school day, as they have for many years, by reciting the Pledge.

II. Review should be granted because the Ninth Circuit's opinion directly conflicts with multiple statements by this Court recognizing the fundamentally cultural character, and therefore the constitutionally permissible nature, of the Pledge.

1. In holding that Elk Grove's policy of offering voluntary student participation in teacher-led recitation of the Pledge violates the Establishment Clause, the Ninth Circuit ignores this Court's repeated recognition of the Pledge as an essentially secular, culturally and historically informed, ceremonial formulary. Review is necessary to correct the Ninth Circuit's error.

This Court has consistently "declined to take a rigid, absolutist view of the Establishment Clause." *Lynch v. Donnelly*, 465 U.S. at 678. Far from ever holding that any government-sanctioned reference to our country's religious heritage is forbidden by the Constitution, the Court has instead stated that a "relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Lee v. Weisman*, 505 U.S. 577, 598 (1992). As stated by this Court, "there is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674. The Court pointed to countless examples of that acknowledgment, including the national motto "In God We Trust" on our currency. *Id.* at 676.

In *Lynch*, this Court approvingly referred to our country's acknowledgments of its religious heritage, including the Pledge, when it held that a city did not violate the First Amendment by including a nativity scene

in an annual Christmas display. *Id.* at 676-77. Subsequently, in ruling on the constitutionality of the display of a creche and a menorah, this Court noted that its prior decisions had characterized the Pledge "as *consistent* with the proposition that government may not communicate an endorsement of religious belief." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 602-03 (1989) (emphasis added).

Justices of this Court have also consistently recognized the cultural and historical basis for the Pledge. Among many examples, Justice Brennan noted that the reference to God in the Pledge "may merely recognize the historical fact that our Nation was believed to have been founded 'under God'." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 304 (1963). Justice O'Connor explained that the Pledge, including the words "under God", serves as an appropriate acknowledgment of religion for the purpose of solemnizing public occasions. *Wallace v. Jaffree*, 472 U.S. 38, 78 n.5 (1985).

Nevertheless, relying on this Court's opinions in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) and *Lee v. Weisman*, 505 U.S. 577 (1992), the Ninth Circuit ruled that offering the Pledge to students was tantamount to coercion of a religious act.

2. But offering an historic, essentially secular, patriotic expression of loyalty that is deeply rooted in tradition should not be equated with a "coerced religious act" merely because some may have a religious objection to the reference to God in the pledge formula. Such a result is suggested by this Court's treatment of Free Exercise objections to neutral regulations of general applicability.

In 1939, this Court declined to review a decision of the California Supreme Court refusing to recognize a religious objection to the recitation of the Pledge of Allegiance by an elementary school student. Significantly, the Court expressly declined review "for want of jurisdiction." *Gabrielli v. Knickerbocker*, 12 Cal.2d 85 (1938), *app. dismissed and cert. denied*, 306 U.S. 621 (1939). Previously, the Court had similarly declined to review other state court judgments upholding the validity of regulations requiring recitation of the Pledge of Allegiance on religious grounds – for want of a substantial federal question. See *Leoles v. Landers*, 192 S.E. 218 (Ga. 1937), *app. dismissed by* 302 U.S. 656 (1937); *Hering v. State Bd. of Education of New Jersey*, 194 A. 177 (N.J.Err. & App.1937), *app. dismissed by* 303 U.S. 624 (1937).

These disputes, of course, antedated Congress' addition of the phrase "under God" to the Pledge of Allegiance, but the recitation of the earlier version of the Pledge offended the religious sensibilities of some students. This Court's dismissal of those Free Exercise claims perhaps foreshadowed the Court's Free Exercise analysis as articulated in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). There, the Court ruled that the First Amendment does not afford a religious exemption from compliance with otherwise neutral laws of general applicability

Amicus submits that a related, if "obverse," analysis may be appropriate here: The Establishment Clause should not be construed to empower Michael Newdow to prevent other students from voluntarily reciting the Pledge of Allegiance in a state-sponsored patriotic exercise merely because he ascribes religious significance to the phrase "under God" and, therefore, views the recitation as

a "coerced religious act." Whatever may have been Congress' original intent in adding the phrase,[2] the two words "under God" are now substantially embodied in the secular culture of the body politic and are submerged in what is undeniably a secular and formulaic expression of patriotism and unity as Americans.

The Ninth Circuit ignored this Court's prior statements about the Pledge, and branded as "religiously coercive" Elk Grove's policy of teacher-led recitation of the Pledge, merely because it includes the phrase "under God." Review is warranted to settle that, despite reference to God, the Pledge's essentially secular character is dispositive of any "coerced religious act" basis for striking down the Pledge on Establishment Clause grounds.

III. Review is necessary to resolve a split between circuits over an issue about which there is an overriding need for national uniformity.

Review is also necessary because the Ninth Circuit's opinion squarely conflicts with the Seventh Circuit's holding in *Sherman v. Community Consolidated School District 21 of Wheeling Township*, 980 F.2d 437 (7th Cir. 1992). In *Sherman*, parents of an elementary school student sued a school district to enjoin compliance with a state statute requiring daily recitation of the Pledge by elementary school pupils. Unlike the Ninth Circuit, the

[2] The Ninth Circuit expressly declined to decide whether the Pledge violates the Establishment Clause as an endorsement of religion or under this Court's analysis in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Seventh Circuit unanimously held that the 1954 amendment to the Pledge is consistent with the Establishment Clause. The Seventh Circuit satisfied itself that the Framers manifestly did not understand ceremonial invocations of God to constitute "establishment" of religion with the meaning of the First Amendment. *Id.* at 445-48.

The Seventh Circuit took note of this Court's observation that the Pledge's reference to God is wholly "*consistent* with the proposition that government may not communicate an endorsement of religious belief." *Id.* at 447 (quoting *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 602-03 (1989)). The Ninth Circuit's decision irreconcilably conflicts with *Sherman*. In contrast to the Ninth Circuit, the Seventh Circuit in *Sherman* prudently elected to maintain the status quo unless and until this Court rules otherwise. Unlike the Ninth Circuit, the Seventh Circuit understood that school-prayer cases are inapplicable where, like here, the reference to God is not part of a state-sanctioned formal religious observance.

There is an overriding need for national uniformity in resolution of Establishment Clause challenges to the Pledge as it has been recited for nearly fifty years by citizens throughout this country and in American installations abroad. It is unimaginable that recitation of the Pledge – a verbal symbol of national unity – might be permissible in one form in one state, but impermissible in that same form in another state. The conflict between the Ninth and the Seventh Circuits demands review and resolution.

CONCLUSION

For the reasons stated, the Court should grant the petitions for certiorari.

Dated: June 18, 2003

Respectfully submitted,

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Nos. 02-1574 and 02-1624

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,

v.

MICHAEL A. NEWDOW, ET AL.

ELK GROVE UNIFIED SCHOOL DISTRICT, ET AL., *Petitioners*,

v.

MICHAEL A. NEWDOW

On Petitions for Writs of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE IN OPPOSITION TO CERTIORARI OR, ALTERNATIVELY, IN SUPPORT OF VACATUR

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QUESTIONS PRESENTED

1. Whether the United States is a "losing party" entitled to invoke the Court's jurisdiction under Section 1254(1).

2. Whether, if the United States is entitled to invoke the Court's jurisdiction, the Court has jurisdiction to adjudicate the merits of respondent's claim against the United States in view of sovereign immunity.

3. Whether the Court should decide the issue of California law on which respondent's Article III standing depends.

4. Whether the Establishment Clause permits teacher-led recitation of the Pledge of Allegiance in public elementary and secondary schools.

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INTEREST OF AMICUS [1]

Americans United for Separation of Church and State is a 75,000-member not-for-profit organization dedicated to defending religious diversity and church-state separation. It advances these goals by speaking out through the media, public forums, and other channels; mobilizing Americans at the grassroots level and through state and regional chapters; advocating for separation of church and state in Congress and state legislatures; and participating in litigation. Americans United was the respondent in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). In the past thirty years it has filed or joined amicus briefs in numerous Establishment Clause cases. *E.g.*, *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000); *Edwards* v. *Aguillard*, 482 U.S. 578 (1987); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

SUMMARY

1. The United States may not invoke the Court's jurisdiction under 28 U.S.C. 1254(1). The district court dismissed Newdow's complaint in its entirety. The Ninth Circuit vacated that dismissal only with respect to Newdow's claim against EGUSD's Pledge policy. Section 1254(1) does not authorize and Article III does not permit the United States to seek review of a lower court's ruling against another party, even though the United States may regret the ruling. Its petition must therefore be denied for want of jurisdiction.

2. Even if the Ninth Circuit were deemed to have upheld a claim against the United States, the Court would lack

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than the amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

jurisdiction to review its judgment with respect to that claim on the merits, because such a claim is barred by sovereign immunity. At most, the United States would be entitled to vacatur of the judgment against it for want of jurisdiction.

3. Newdow's Article III standing to challenge the school district's Pledge policy turns on a novel and unsettled question of California law that the Court should not decide without clear guidance from the California Supreme Court. This Court normally does not second-guess a court of appeals' determination of state law. Doing so here would be particularly inadvisable because it would require the Court to decide a disputed state-law question with far-reaching implications for non-custodial parents under California law. Deciding that question against Newdow, moreover, could present the Court with further constitutional issues to resolve. The Court should not expend its energies to such ends simply to reach the merits. Instead, it should deny the petitions and await a case without such complications. At most, the Court should grant the petition in No. 02-1624, vacate the Ninth Circuit's judgment, and remand with a direction to certify to the California Supreme Court the state-law question on which Newdow's Article III standing depends. The state court's answer to that question could obviate any need to decide the federal constitutional claim.

4. Review of the Ninth Circuit's holding that the school district's Pledge policy violates the Establishment Clause is unwarranted. The court of appeals faithfully applied this Court's precedents "protecting freedom of conscience from subtle coercive pressures in the elementary and secondary public schools." *Lee* v. *Weisman*, 505 U.S. 577, 592 (1992). The court correctly recognized that teacher-led classroom recitation of the Pledge is no mere commemoration of historical or cultural fact but a "ceremony of assent." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 634 (1943). The court also correctly recognized that pledging allegiance

to a nation "under God" implies a belief in the existence of "God" and a commitment to a polity defined by religious devotion and subordination to divine authority. And the court correctly determined that, to this extent, teacher-led classroom recitation of the Pledge is a religious exercise—not because it contains religious references, but because it is a *pledge*—and as such must be forbidden in public elementary and secondary schools because of its inescapably and uniquely coercive effect.

ARGUMENT

I. THE UNITED STATES IS NOT A "LOSING PARTY" ENTITLED TO INVOKE THE COURT'S JURISDICTION.

Section 1254(1) provides for review of a civil or criminal case in a court of appeals upon the petition of "any party" to the case. As the Court has explained, however, its certiorari jurisdiction can be invoked only by a party who has lost below. Section 1254(1) does not authorize and Article III does not permit review at the behest of a prevailing party. See *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam); *Maine* v. *Taylor*, 477 U.S. 131, 136 (1986); see generally *Hohn* v. *United States*, 524 U.S. 236, 241 (1998); *Lewis* v. *Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990).

EGUSD lost below; the United States prevailed. The district court dismissed Newdow's complaint in its entirety, including (i) his claims against EGUSD and SCUSD with respect to their Pledge policies, and (ii) his claim against the United States and the other federal defendants with respect to the federal Pledge statute. The Ninth Circuit vacated the district court's dismissal of the complaint only "with respect to Newdow's claim that the school district's Pledge policy violates the Establishment Clause." App. 18a. The court "decline[d] to reach" the constitutionality of the federal Pledge statute, *id.*, invalidating EGUSD's policy not be-

cause it found the Pledge inherently unconstitutional, but because it found teacher-led classroom recitation of the Pledge impermissibly coercive, *id.* at 11a-16a. Newdow's claim against it having been dismissed, and the Ninth Circuit having left that aspect of the district court's ruling undisturbed, the United States is now out of the case. Its petition must therefore be denied for want of jurisdiction.

The Solicitor General asserts that the Ninth Circuit "vacated the district court's decision in favor of the United States" with respect to Newdow's challenge to the facial constitutionality of the Pledge. US Pet. 11. That is incorrect. As the Ninth Circuit noted, the district court did not decide that question. App. 18a. Indeed, the United States argued below that Article III barred adjudication of that question because it was the school district's policy, not the federal statute, that was the source of Newdow's claimed injury. *E.g.*, Pet. of US for Reh'g and Reh'g en Banc 2, 15-17. The United States argued that the *only* claim Newdow had standing to assert, if any, was his "interference" claim, which the United States argued was "properly directed at [the] state defendants," not the United States. *Id.* at 17.

The Solicitor General also asserts that the federal statute has been invalidated "as applied." US Pet. 25. That is also incorrect. It is not the federal statute that has been applied but the California law requiring "patriotic exercises" to be conducted at the beginning of each school day, which can be satisfied by reciting the Pledge. See App. 2a-3a. As the United States noted below, the federal statute "simply sets out the words of the 'official' pledge. It does not dictate or require any action by plaintiff's daughter or her school." Mot. to Address Juris. Issues 3; see also App. 53a n.1 (Fernandez, J., concurring and dissenting) ("Congress has not compelled anyone to do anything.").

Finally, the Solicitor General asserts that the Ninth Circuit's ruling "calls into question" practices in schools for

military dependants. US Pet. 2 n.2. But Newdow did not challenge those practices, Article III would not have allowed him to challenge them, see App. 7a-8a (dismissing claim against SCUSD for lack of standing), and the Ninth Circuit did not rule on them. Article III does not allow the United States to seek review of the Ninth Circuit's ruling based on its possible implications for those practices. See *Rooney*, 483 U.S. at 311 (lower court's use of analysis that may be adverse to prevailing party's "long-term interests does not allow the [party] to claim status as a losing party for purposes of this Court's review").

II. THE COURT LACKS JURISDICTION TO DECIDE THE MERITS OF NEWDOW'S CLAIM AGAINST THE UNITED STATES.

In any event, the United States would not be entitled to merits review of any judgment against it. Sovereign immunity barred Newdow's claim against the United States. The courts below therefore lacked jurisdiction to decide that claim, and this Court does as well.[2] At most, the United States would be entitled to vacatur of the judgment against it with respect to that claim for want of jurisdiction.

1. "Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity." *United States* v. *White Mountain Apache Tribe*, 123 S. Ct. 1126, 1132 (2003). "Absent that consent, the attempted exercise of judicial power is void." *United States* v. *U.S. Fid. & Guar. Co.*, 309 U.S. 506, 514 (1940). Here, as the Solicitor General observes, "[n]o federal statute waives the sovereign immunity of the United

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[2] The Court must "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a case under review, even though the parties are prepared to concede it." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 73 (1997) (internal quotation marks omitted).

States of America from a suit for declaratory or injunctive relief under the First Amendment," US Pet. 2, and the Solicitor General does not contend that the United States waived sovereign immunity by participating below.[3] Accordingly, the courts below lacked jurisdiction over Newdow's claim against the United States, precluding merits review. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 95 (1998).

2. The Solicitor General asserts that sovereign immunity is "without jurisdictional consequence" because, under 28 U.S.C. 2403(a), the United States "could have" intervened in connection with Newdow's action against the other defendants to defend the constitutionality of the federal Pledge statute; and the Solicitor General urges that the United States "should hereby be deemed to have" done so. US Pet. 2. But the Solicitor General offers no justification for grounding this Court's jurisdiction in action that a person "could have" taken below. Cf. *Steel Co.*, 523 U.S. at 94-101 (rejecting "hypothetical jurisdiction"). Such a counterfactual, hypothetical basis for jurisdiction is insufficient.[4]

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[3] Officers of the United States cannot waive sovereign immunity by participating in a case; only Congress can waive sovereign immunity. See, *e.g.*, *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947); *Minnesota* v. *United States*, 305 U.S. 382, 388-89 (1939).

[4] See *Philbrook* v. *Glodgett*, 421 U.S. 707, 720-22 (1975). In *Philbrook* the Court dismissed an appeal by the Secretary of HEW from a decision of a three-judge district court because the Secretary failed to establish that the district court actually had jurisdiction to entertain the plaintiff's claim against him. The Secretary argued that it was unnecessary for him to establish that the district court had jurisdiction because he intended to intervene on remand if the Court ruled in his favor and to abide by the Court's decision if it did not. The Secretary's reliance on what he could do on remand to perfect jurisdiction was unavailing in *Philbrook*; the Solicitor General's reliance on what the United States "could have" done earlier to perfect jurisdiction is unavailing here.

As the Solicitor General implicitly recognizes, the United States cannot intervene under Section 2403(a) now. Section 2403(a) applies only when "the constitutionality of [an] Act of Congress . . . is drawn in question," and the Ninth Circuit "decline[d] to reach" the constitutionality of the federal statute, App. 18a; *supra* pp. 3-4; see also *Nat'l Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) ("we do not decide in the first instance issues not decided below").

III. NEWDOW'S STANDING TURNS ON A NOVEL AND UNSETTLED ISSUE OF STATE LAW.

The Ninth Circuit's holding that Newdow has Article III standing is entirely dependent on its resolution of a novel and unsettled issue of California law with far-reaching implications for the rights of non-custodial parents. The Ninth Circuit's resolution of this issue does not warrant review, and it would be inadvisable for the Court to review the issue without clear guidance from the California Supreme Court and briefing by interested parties.

1. In its Oct. 9, 2002, Order, the Ninth Circuit directed briefing on the following two questions:

> Whether under CA state law the award of sole legal custody to one parent deprives the other of standing to object on constitutional grounds to the contents of school curricula, observances, and ceremonies affecting the child's education and religious upbringing. If the answer is yes, is the California rule constitutional?

After briefing, the Ninth Circuit found that California law recognizes a non-custodial parent's right to object on constitutional grounds to school policies that undermine his efforts to influence his child's religious upbringing, regardless of whether the custodial parent consents to those policies. App. 95a-98a (discussing California cases). The court's holding that Newdow had Article III standing rests entirely on its conclusion that California law recognizes such a right.

The Court normally accepts a court of appeals' determination of state law and does not grant certiorari to review such determinations. The Court should be especially reluctant to grant review where, as here, resolving an Article III standing issue would require the Court to decide a novel and unsettled question of state law having far-reaching implications for the rights of non-custodial parents under California law. See EGUSD Pet. 20 ("[n]o California court has addressed" the issue); EGUSD Supp'l Br. Regarding Standing and Const'l Issues 1-2 ("This is a matter of first impression . . . ."); Supp'l Br. of US on Pet. for Reh'g en Banc 1-8 (Newdow's standing turns on question of California law).

The Court should decline to address this important state-law issue without clear guidance from the California Supreme Court and thorough briefing by parties and amici with a broader interest in issues of family law. Were this Court to decide the state-law issue against Newdow, moreover, it might then need to decide whether the resulting state-law rule *denying* Newdow the right to challenge the school district's policy is constitutional. See Ninth Circuit Order, Oct. 9, 2002. The Court should decline petitioners' invitation to decide the state-law issue as well as their invitation to use this case to limit, as a matter of *federal* law, the rights states may allow non-custodial parents to assert once they have lost custody. See US Pet. 26-27; EGUSD Pet. 20-21; cf. *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).

At most, the Court should grant the petition in No. 02-1624, vacate the judgment of the Ninth Circuit, and remand the case with a direction that the Ninth Circuit certify to the California Supreme Court the state-law question on which Newdow's Article III standing depends, or grant the petition and certify the question directly. See Cal. Ct. R. 29.8(a); see also *Arizonans for Official English*, 520 U.S. at 77 (certification appropriate where case presents novel or unsettled questions of state law); *Bellotti* v. *Baird*, 428 U.S. 132, 150-

52 (1976) (GVR directing certification to state court); *Clay* v. *Sun Ins. Office, Ltd.*, 377 U.S. 179, 180-81 & n.2 (1964) (same); *Fiore* v. *White*, 528 U.S. 23, 29-30 (1999) (certifying question directly); *Virginia* v. *Am. Booksellers Ass'n*, 484 U.S. 383, 395-98 (1988) (same).

Of the two certification options, a GVR with a direction to certify would be the more appropriate disposition here because of the Ninth Circuit's "greater familiarity with the record and [California] law." *Mills* v. *Rogers*, 457 U.S. 291, 306 (1982). Either disposition, however, would avoid the need for the Court to decide a far-reaching question of California law and the further constitutional issues that could be raised by its answer. It is possible, moreover, that the California court's answer to the state-law question would obviate any need to decide the ultimate constitutional issue. See *Clay* v. *Sun Ins. Office Ltd.*, 363 U.S. 207, 212 (1960) ("[W]e have frequently deemed it appropriate, where a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law.").[5]

2. Petitioners offer several criticisms of the Ninth Circuit's holding that Newdow has standing to challenge the school district's policy. These criticisms lack merit.

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[5] The Court could also direct the Ninth Circuit to remand for consideration by the district court, or to certify to the California Supreme Court, a second state-law question, presented by Newdow in his *pro se* complaint. Newdow alleged that the school districts' Pledge policy violated not only the First Amendment but also Art. I, § 4 and Art. IX, § 8 of the California Constitution. Compl. ¶¶ 67, 118. The district court should have considered his state constitutional challenge before deciding his federal constitutional challenge. See, *e.g.*, *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 117-18 (1984) (citing *Ashwander* v. *Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Siler* v. *Louisville & Nashville R.R. Co.*, 213 U.S. 175, 192-93 (1909)).

a. The Solicitor General asserts that Newdow lacks standing because he "has not suffered the invasion of any legally protected interest." US Pet. 26; accord EGUSD Pet. 20. This, however, merely expresses disagreement with the Ninth Circuit's conclusion that California law affords Newdow such an interest and that the custody order does not empower the custodial parent to negate that interest. The Solicitor General asserts that Newdow is improperly using federal litigation to circumvent state-law processes or modify his custody agreement. US Pet. 27 (citing *Rooker-Feldman* doctrine). This likewise is but an indirect way of saying that the Ninth Circuit's interpretation of Newdow's rights under California law was incorrect. Finally, the Solicitor General asserts that Newdow's right to expose his daughter to his religious views is narrower than the Ninth Circuit supposed. *Id.* at 28. Again, this simply disputes the Ninth Circuit's understanding of the implications of pertinent California law. If the Ninth Circuit's interpretation of California law is correct, Newdow has Article III standing.[6]

b. The Solicitor General also asserts that the Ninth Circuit confused Newdow's standing with the merits of his claim. See US Pet. 28-29. The Solicitor General is mistaken. The injury Newdow has identified is the school district's interference with his efforts to influence his daughter's religious upbringing. The merits issue he seeks to have adjudicated is the constitutionality of that interference. The Ninth Circuit held that under California law Newdow's status as a non-custodial parent does not deprive him of the ability to object to such interference on constitutional grounds.

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[6] The Solicitor General disputes that Newdow's rights under the custody order have been infringed. US Pet. 26-27. This is a straw man. The Ninth Circuit's standing holding rested on its conclusion that under California law Newdow retained rights as a non-custodial parent that the custody order did not displace. App. 96a-98a.

c. Finally, the Solicitor General asserts that invalidating the school district's Pledge policy will not redress Newdow's claimed injury. *Id.* at 29-30. That is also incorrect. Newdow's injury stems not from his daughter's exposure to the Pledge but from her being coerced to participate in reciting the Pledge in a public school ritual. *E.g.*, Compl. ¶¶ 99-101; App. 96a-98a. Invalidation of the school district's Pledge policy obviously redresses that injury.

IV. THE LOWER COURT'S MERITS HOLDING IS LIMITED AND WELL SUPPORTED.

The Ninth Circuit's original decision in this case invalidated not only the school district's Pledge policy, but also the federal Pledge statute. In its amended decision, the Ninth Circuit—urged by the United States that Article III barred adjudication of the constitutionality of the federal statute—declined to decide the constitutionality of the statute. The court limited its holding to daily teacher-led recitation of the Pledge in public elementary schools and rested its holding on the special problems of indirect coercion presented in that setting. The court's decision is a faithful application of this Court's precedents and does not warrant review.[7]

1. The Court has long recognized that children are subject to a "pronounced" and "particular risk" of coercion in school settings. *Lee*, 505 U.S. at 592; see also, *e.g.*, *Santa Fe*, 530 U.S. at 315-17; *Aguillard*, 482 U.S. at 583-84; *Wallace* v. *Jaffree*, 472 U.S. 38, 81 (1985) (O'Connor, J., concurring in judgment); *School Dist.* v. *Schempp*, 374 U.S. 203, 290 (1963) (Brennan, J., concurring). The Court ac-

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[7] The Ninth Circuit thus did not hold that "the inclusion of the phrase 'under God' in the Pledge of Allegiance . . . violates the Establishment Clause of the First Amendment." US Pet. at I. The first question in the petition in No. 02-1574 is therefore far too broadly stated.

cordingly has "been 'particularly vigilant' in monitoring compliance with the Establishment Clause in [the primary and secondary school] context, where the State exerts 'great authority and coercive power' over students through mandatory attendance requirements." *City of Elkhart* v. *Books*, 121 S. Ct. 2209, 2211 (2001) (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting from denial of certiorari) (quoting *Aguillard*, 482 U.S. at 583-84); see also *Lee*, 505 U.S. at 631 (Souter, J., joined by Stevens & O'Connor, JJ., concurring) ("When public school officials, armed with the State's authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause.").

The Court has further recognized that, even if students are not formally required to participate in a religious exercise in a school setting, their susceptibility to peer pressure and a desire to please adult school officials in a setting where attendance is mandatory produce an "improper" coercive effect, *Santa Fe*, 530 U.S. at 311, placing students in an "untenable position" of choosing between participation and protest, *Lee*, 505 U.S. at 590. For primary and secondary school children, the Court has stated, such a choice is no choice at all. *Lee*, 505 U.S. at 593-94. Contrast *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983) (Establishment Clause concerns diminish when those claiming injury are adults "not readily susceptible to 'religious indoctrination' . . . or peer pressure."); *Tilton* v. *Richardson*, 403 U.S. 672, 686 (1971) (plurality opinion) ("college students are less impressionable and less susceptible to religious indoctrination" than elementary and secondary school-age children).

2. The Ninth Circuit correctly recognized that daily teacher-led recitation of the Pledge in primary school classes presents a forbidden risk of indirect religious coercion.

a. The Pledge is a tool for inculcating primary and secondary school children with the ideals it embodies; that is why

it is prescribed for them. The Pledge accomplishes its inculcative purpose through a "ceremony of assent," *Barnette*, 319 U.S. at 634, a "ritual," *id.*, accompanied by "gestures of acceptance or respect," *id.* at 632. To recite the Pledge is "to declare a belief," *id.* at 631, to affirm "a belief and an attitude of mind," *id.* at 633. In this "prescribed ceremony," *id.* at 633, students stand at attention, facing the flag, right hand on heart, and in unison with each other and adult authorities proclaim their "allegiance to the flag of the United States of America and to the Republic for which it stands." The Pledge defines that "Republic" by specific qualities—unity and indivisibility ("one Nation . . . indivisible"), subordination to divine authority ("under God"), and universal "liberty and justice." The Court recognized in *Barnette* that such qualities are not "descriptive of the present order" or "political history," but are "statement[s] of belief" in an "ideal" vision. *Id.* at 634 & n.14. The purpose of teacher-led classroom recitation of the Pledge is to inculcate children with this ideal vision, through a ritual communicating "by word and sign" their "acceptance of the political ideas [the flag] bespeaks." *Id.* at 633.

b. Since 1954, the Pledge has included, among the ideas whose acceptance it communicates, belief in God, national subordination to God, and national religious devotion. The addition of the phrase "under God" was no mere attempt to "acknowledge" the nation's "religious heritage" and its "culture and character." US Pet. 21. Rather, the phrase was added so that school children would daily "proclaim . . . the dedication of our Nation and our people to the Almighty." App. 14a (quoting signing statement of the President); see also H.R. Rep. No. 83-1693, at 3 (1954) (asserting that "under God" is consistent with First Amendment because it expresses "a belief in the sovereignty of God" rather than affirming "religion as an institution," and because it "recognizes only the guidance of God in our national affairs"); S. Rep. No. 83-1287, at 2 (1954) (same).

In explaining the measure, Rep. Rabaut, the House sponsor, stated: "Unless we are willing to affirm our belief in the existence of God and His creator-creature relations to man, we drop man himself to the significance of a grain of sand . . . ." 100 Cong. Rec. 1700 (1954). Senator Ferguson, the Senate sponsor, stated that he had proposed "under God" because he felt that the Pledge "should recognize the Creator who we really believe is in control of the destinies of this great Republic." *Id.* at 6348. While asserting that "[t]his is not an attempt to establish a religion," he explained:

> It relates to belief in God, in whom we sincerely repose our trust. We know that America cannot be defended by guns, planes, and ships alone. Appropriations and expenditures for defense will be of value only if the God under whom we live believes that we are in the right. We should at all times recognize God's province over the lives of our people and over this great Nation.

Id. Representative Rodino, author of a like measure, urged adoption of the phrase to ensure that "every day that our children go to school and make their pledge of allegiance to the flag they recall that they do so with recognition of God." *H.J. Res. 243 and Other Bills on Pledge of Allegiance: Hearing Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 83d Cong. 37 (1954). "The important thing," he stated, "is that we re-affirm our recognition of the Creator." *Id.* at 27.

Petitioners ignore all such statements, pretending they do not exist. See US Pet. 3-5; EGUSD Pet. 11-14.

At least equally relevant is how the phrase added in 1954 is likely to be perceived by "impressionable" school children, for whom "government endorsement is much more likely to result in coerced religious beliefs." *Jaffree*, 472 U.S. at 81 (O'Connor, J., concurring in judgment); see *Santa*

Fe, 530 U.S. at 307 (touchstone is "how the students understand the policy"); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 128 (2001) (Breyer, J., concurring) ("[A] child's perception that the school has endorsed a particular religion or religion in general may . . . prove critically important."); *Lynch* v. *Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) ("Examination of both the subjective and the objective components of the message communicated by a government action is . . . necessary to determine whether the action carries a forbidden meaning.").

Children are unlikely to perceive the phrase "under God" as merely descriptive of historical or cultural fact. First, the phrase is one in a series of other phrases that the Court in *Barnette* recognized are *not* "descriptive" of such fact but express ideals in which the Pledge affirms belief. See *supra* pp. 12-13. Children are unlikely to view "under God" as having an import different from the other phrases that surround it. See *Gutierrez* v. *Ada*, 528 U.S. 250, 255 (2000) (applying *noscitur a sociis*); *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (same). It would take a very subtle six-year-old, moreover, to regard the averment that ours is "one Nation under God"—proclaimed as part of a daily classroom ritual, and beginning with the words "I pledge"—as simply "acknowledging" beliefs that *other people* hold and that may or may not be true. Children are bound to perceive the phrase as affirming a belief in the existence of God and national subordination to God, and as expressing commitment to a nation defined by religious devotion. To this extent, teacher-led classroom recitation of the Pledge is a religious exercise—an exercise in religious affirmation—and hence forbidden, even if student participation is not formally required, because of the special risk of indirect coercion.

That the exercise does not take the form of a prayer is irrelevant, for "[t]he government may not compel affirmation

of religious belief." *Employment Div.* v. *Smith*, 494 U.S. 872, 877 (1990); see also *Good News Club*, 533 U.S. at 126 (Scalia, J., concurring) ("[W]e have previously rejected the attempt to distinguish worship from other religious speech, saying that 'the distinction has [no] intelligible content,' and further, no '*relevance*' to the constitutional issue.") (second alteration in original) (quoting *Widmar* v. *Vincent*, 454 U.S. 263, 269 n.6 (1981)) (citing *Murdock* v. *Pennsylvania*, 319 U.S. 105, 109 (1943)). The Establishment Clause, moreover, bars government endorsement of religion, not just government-sponsored prayer. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement or approval of religion.").

The fact that "under God" is included in a patriotic text does not diminish but compounds the constitutional violation. Far from imbuing the phrase with redeeming "secular purposes," *County of Allegheny* v. *ACLU*, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring in part and concurring in judgment), the phrase impermissibly conditions an expression of patriotism on affirmation of religion and religious belief. Cf. *Torcaso* v. *Watkins*, 367 U.S. 488 (1961) (state may not require declaration of belief in God as condition of public office). As the Court has emphasized, the Establishment Clause prohibits government from "making adherence to a religion relevant in any way to a person's standing in the political community." *Allegheny*, 492 U.S. at 594 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J. concurring in part and concurring in judgment)). The pressure on a child to affirm religious belief by reciting the Pledge is magnified by the fact that refraining from reciting the Pledge may be construed as lack of patriotism.

Finally, the fact that the phrase "under God" has been part of the Pledge for nearly fifty years does not change the equation: "[N]o one acquires a vested or protected right in

violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." *Allegheny*, 492 U.S. at 630 (O'Connor, J., joined by Brennan & Stevens, JJ., concurring in part and concurring in judgment) (alteration in original) (quoting *Waltz* v. *Tax Comm'n*, 397 U.S. 664, 678 (1970)).

c. The Ninth Circuit's decision does not imply that school children may not learn, study, or recite historical documents containing religious references. See App. 15a-16a. To the contrary, "the State may require teaching by instruction and study of all in our history and in the structure and organization of our government." *Barnette*, 319 U.S. at 631 (internal quotation marks omitted); see also *Stone* v. *Graham*, 449 U.S. 39, 42 (1980) (per curiam); *Schempp*, 374 U.S. at 225; *Engel* v. *Vitale*, 370 U.S. 421, 435 n.21 (1962). Nor does the Ninth Circuit's decision imply that the Pledge is inherently unconstitutional, or that recitation of the Pledge under official auspices is invariably unconstitutional.

3. The conclusion that teacher-led recitation of the Pledge is forbidden even if participation is not formally required is not inconsistent with *Barnette*. See EGUSD Pet. 9-11. "The First Amendment protects speech and religion by quite different mechanisms." *Lee*, 505 U.S. at 591. No Establishment Clause issue was presented in *Barnette* because the Pledge had not yet been amended to include "under God." The "indirect coercion" principle, recognized by the Court in *Lee*, *Santa Fe*, and other cases, applies where religion is involved because of the Establishment Clause's specific bar against government promotion of religion—a bar that does not apply to government promotion of patriotism. "Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion," *id.* at 604 (Blackmun, J., joined by Stevens & O'Connor, JJ., concurring), and "[t]he Establishment Clause proscribes public schools from conveying or

attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*," *id.* at 604-05 (internal quotation marks omitted).

Nor is the Ninth Circuit's decision foreclosed by statements concerning the Pledge by the Court or individual Justices. See US Pet. 14-20; EGUSD Pet. 7-9. The Court has never held that the Establishment Clause permits teacher-led recitation of the Pledge in public elementary and secondary schools, and the Court's *dicta* do not preclude a holding of its unconstitutionality in the circumstances presented here. Indeed, the dissent in *Lee* recognized that the Court's Establishment Clause analysis in that case foretold the result reached by the Ninth Circuit. 505 U.S. at 638-39 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting).

In *Lynch* and *Allegheny* the Court did not confront the issue of teacher-led classroom recitation of the Pledge, with its special issues of indirect coercion; and the principle of *Marsh* likewise has no application in the classroom setting, see *Lee*, 505 U.S. at 596-97. The Court's discussion of the Pledge was not "necessary to the result" in these cases. US Pet. 19. Indeed, in *Allegheny* the Court disclaimed the need to address issues raised by the Pledge, see 492 U.S. at 602-03; and inculcative classroom recitation of the Pledge *fails* the test outlined by Justice O'Connor in her concurring opinion in *Lynch*, see 465 U.S. at 689-94. Such inculcative recitation is not a device for achieving the "secular purposes" identified by Justice O'Connor in her opinion, *Lynch*, 465 U.S. at 693, and cannot be defended on the ground that it conveys no message of religious endorsement and entails no affirmation of religious belief. Compare *Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring in part and concurring in judgment), and *Jaffree*, 472 U.S. at 78 n.5 (O'Connor, J., concurring in judgment) (referring to Pledge in the abstract).

Inculcative teacher-led classroom recitation of the Pledge does both.[8]

4. Finally, although the Ninth Circuit's decision conflicts with the Seventh Circuit's decision in *Sherman* v. *Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992), the conflict does not require the Court's intervention now, and the state-law issues going to Newdow's standing as well as the jurisdictional issues raised by the petition in No. 02-1574 militate against review. The Court has tolerated similar inconsistencies before. In *City of Edmond* v. *Robinson*, 517 U.S. 1201 (1996), the Court declined to resolve a 2-1 circuit split on the question whether a municipality violates the Establishment Clause when its seal includes a religious symbol. And in *Good News Club*, the Court intervened to resolve a circuit conflict that it had earlier declined to resolve in *Bronx Household of Faith* v. *Board of Education*, 523 U.S. 1074 (1998) (order denying certiorari). See *Good News Club*, 533 U.S. at 105-06 (describing circuit split).

Similar forbearance is warranted here. The Seventh Circuit's decision that the school district policy in question

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[8] In *Schempp*, Justice Brennan simply stated that the Pledge "may" not be unconstitutional, 374 U.S. at 304 (concurring), and Justice Goldberg simply stated that the decision did not render unconstitutional, "without more," "all incidents of government which import of the religious," *id.* at 307 (Goldberg, J., joined by Harlan, J., concurring). Justice Brennan reiterated his uncertainty in *Marsh*, 463 U.S. at 783 (Brennan, J., joined by Marshall, J., dissenting), and *Lynch*, 465 U.S. at 716-17 (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting), in all three cases suggesting that the Pledge might escape invalidation only if deemed to "have lost through rote repetition any significant religious content," *Lynch*, 465 U.S. at 717; see *Marsh*, 463 U.S. at 818 (Brennan, J., joined by Marshall, J., dissenting); *Schempp*, 374 U.S. at 303-04 (Brennan, J., concurring). Justice Brennan was not considering in these cases inculcative teacher-led classroom recitation of the Pledge.

there did not violate the Establishment Clause rested on its view that the Founders did not regard "ceremonial invocations of God as 'establishment,'" *Sherman*, 980 F.2d at 445, and on its view that this Court's statements about the Pledge in previous opinions precluded a finding of unconstitutionality, *id.* at 446-48. In the decade since *Sherman*, the Seventh Circuit has shown reluctance to accept non-religious rationalizations for religious symbols and references.[9] Meanwhile, this Court has continued to emphasize "the myriad, subtle ways in which Establishment Clause values can be eroded." *Santa Fe*, 530 U.S. at 314 (quoting *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring)). Were the Seventh Circuit to reconsider the issue today, it might well reach a different conclusion. Especially in view of the factors militating against review here, other circuits should be allowed to consider the issue before the Court intervenes.

CONCLUSION

The petitions in Nos. 02-1574 and 02-1624 should be denied. Alternatively, the petition in No. 02-1574 should be denied, and the petition in No. 02-1624 should be granted, the Ninth Circuit's decision vacated, and the case remanded with a direction to certify to the California Supreme Court the question whether California law gives Newdow the right to object on constitutional grounds to the school district's Pledge policy notwithstanding the custodial parent's acquiescence in that policy.

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[9] See *Books* v. *City of Elkhart*, 235 F.3d 292, 306 (7th Cir. 2000) (Ten Commandments display in municipal space unconstitutional; rejecting rationale for display as recognition of "cultural heritage"); *Kerr* v. *Farrey*, 95 F.3d 472, 480 (7th Cir. 1996) (statement "God, as we understood Him" in prison-sponsored substance-abuse program rejected as religious in nature; rejecting rationale that phrase simply expressed "non-religious idea of willpower within the individual").

Respectfully submitted,

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JUN 2 6 2003

No. 02-1574

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner,*

v.

MICHAEL A. NEWDOW, *et al.*, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE KNIGHTS OF COLUMBUS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS*

The Knights of Columbus respectfully submits this brief *amicus curiae* in support of Petitioner pursuant to Rule 37.3 of this Court.[1]

The Knights of Columbus is the largest Catholic laymen's organization with approximately 1.7 million members in a dozen countries. Ever since its beginnings in the basement of a church in New Haven, Connecticut, its members have understood that American concepts of freedom flow from an authority higher than the State, and that the State must respect these freedoms. *Amicus* has thus long been vigilant in defending that principle. *Amicus*, for example, underwrote the litigation in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), to make this very point and has underscored that message in a great many cases in a long and distinguished history of litigation before this Court.

Amicus has emphasized the same message before the Congress and Executive Branch as well. In fact, *amicus* has a special interest in the amendment to the Pledge of Allegiance at issue here because *amicus* played an integral role in its adoption. In 1951, the Supreme Board of Directors of the Knights of Columbus amended the Pledge of Allegiance recited at their own meetings by adding the words "under God" after "nation." *See Amendment of K. of C. for Pledge of Allegiance Adopted by Senate*, NEW HAVEN REGISTER, May 13, 1954; *"Under God" Under Attack*, COLUMBIA, Sept. 2002, at 8-9. In 1952, the Knights recommended this same action to the President, Vice-President, and members of both Houses of Congress. *See K. of C. Urged Revised Oath*, NEW YORK JOURNAL-AMERICAN, May 18, 1954.

Amicus was motivated by the same purpose as Congress would later be—to emphasize the limited nature of the American

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* and its members made any monetary contributions to the preparation or submission of this brief.

Republic, bound as it is to respect the inalienable rights of its people. President Dwight D. Eisenhower recognized this motivation when he thanked the Knights of Columbus for its role in the amendment:

> [W]e are particularly thankful to you for your part in the movement to have the words "under God" added to our Pledge of Allegiance. These words will remind Americans that despite our great physical strength we must remain humble. They will help us to keep constantly in our minds and hearts the spiritual and moral principles which alone give dignity to man, and upon which our way of life is founded. For the contribution which your organization has made to this cause, we must be genuinely grateful.

Letter from Dwight D. Eisenhower to Luke E. Hart, Supreme Knight of the Knights of Columbus, Aug. 17, 1954, *reprinted in "Under God" Under Attack*, *supra*, at 9.

SUMMARY OF THE ARGUMENT

The judgment below threatens more than just the Pledge of Allegiance. It menaces as well the traditional understanding that fundamental rights must be respected by the State precisely because they are prior to the State.

This is an understanding that has been shared, since the Founding, by all three branches of the federal government. The House of Representatives Report on the joint resolution adding "under God" to the Pledge is a perfect example:

> Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp.

H.R. REP. NO. 83-1693, at 1-2 (1954).

The Executive Branch has also consistently acknowledged that tradition. Presidents from John Adams to William Henry Harrison, from Calvin Coolidge to John F. Kennedy, have insisted that our government is a limited one, bound to respect the inalienable rights of its people. President Kennedy is a good example. In his *Inaugural Address* he explained: "[T]he same revolutionary beliefs for which our forbears fought are still at issue around the globe—the belief that the rights of man come not from the generosity of the state, but from the hand of God." John F. Kennedy, Inaugural Address (Jan. 20, 1961), *reprinted in* LOTT, *supra*, at 306, 306.

This Court's oft-quoted line in *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), that our institutions presuppose a Supreme Being likewise makes sense only in that context.

In sum, all three branches of our federal government have long recognized the premise from which Jefferson argued his Declaration of Independence, namely that our freedom is grounded in an authority higher than the State. The Ninth's Circuit's judgment is fundamentally at odds with that principle. If reciting the Pledge is unconstitutional simply because it refers to a nation "under God," then reciting the Declaration of Independence, which refers to the Creator as the source of rights, is surely cast in doubt. And that would mean that publicly acknowledging the traditional grounding of our rights itself arguably violates those very rights. That would be an earthquake in our national ethos—one that should not be endured merely at the behest of the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

The judgment below threatens not only one patriotic rite and one particular federal statute. It challenges the American principle that fundamental rights are inalienable by the State precisely because they exist prior to the State. This is a sea-change in our nation's self-understanding that should not be ordered merely by a decision of the Ninth Circuit without further review by this Court.

At least since the Declaration of Independence was written, our national ethos has held that we have inalienable rights that the State cannot take away, because the source of those inalienable rights is an authority higher than the State. The Pledge, like the Declaration, is a statement of political philosophy, not of theology. Nevertheless, it is a statement of political philosophy that depends for its force on the premise that our rights are only inalienable because they inhere in a human nature that has been "endowed" with such rights by its "Creator."

All three branches of our federal government—including the Congress that inserted the words "under God" into the Pledge—have stood consistently and continuously in that tradition. As Congressman Wolverton observed in urging the inclusion of "under God" in the Pledge,

> Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that every human being has been created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. Thus, the inclusion of God in our pledge of allegiance . . . sets at naught the communistic theory that the State takes precedence over the individual . . . .

100 CONG. REC. 7336 (1954) (statement of Rep. Wolverton).

The proponents of adding the phrase "under God" to the Pledge were conscious not only of that tradition generally,[2] but

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[2] This Court has often rehearsed in considerable detail how the Framers did not view references to or invocations of God as an "establishment" of religion. *See, e.g., County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 671-73 (1989) (opinion of Kennedy, J.); *Lynch v. Donnelly*, 465 U.S. 668, 675-78 (1984); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). Government expression may *acknowledge* or *reflect* the broader culture, including its religious elements, *Marsh*, 463 U.S. at 792 (permitting government religious expression as "acknowledgment of beliefs widely held among the people of this country"), as long as it does not *establish* religion. That is, government may freely recognize the role of religion in society, so long as it does not proselytize for or "endorse" it. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306-08 (2000). Indeed, there "is an unbroken history of official acknowledgment by all three branches of

also of the exigencies of their historical moment. As the court below conceded, a prime reason the words "under God" were inserted into the Pledge was to distinguish this country from the Soviet Union.[3] But this was not some jingoistic exercise in contrasting good believers with bad atheists. It was a serious reflection on the different visions of human nature, and therefore of human freedom, that underlay the two systems. Representative Louis Rabault, who first proposed the change in the House of Representatives, explained his motivation:

> My reason for introducing this resolution may be very briefly stated. The most fundamental fact of this moment of history is that the principles of democratic government are being put to the test. The theory as to the nature of man which is the keystone in the arch of American Government is under attack by a system whose philosophy is exactly the opposite.
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> . . .
>
> . . . Our political institutions reflect the traditional American conviction of the worthwhileness of the individual human being. That conviction is, in turn, based on our belief that the human person is important because he has been created in the image and likeness of God and that he has been endowed by God with certain inalienable rights which no civil authority may usurp.

100 CONG. REC. 5750 (1954). The House Report likewise echoed that idea:

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government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674.

[3] The legislative history is replete with references to "times such as these," 100 CONG. REC. 7336 (1954) (statement of Rep. O'Hara); "communism," *id.* at 7332 (statement of Rep. Bolton); "the conflict now facing us," *id.* at 7333 (statement of Rep. Rabaut); "a time in the world," *id.* at 7338 (statement of Rep. Bolton); and "this moment in history," *id.* at 5750 (statement of Rep. Rabault).

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.

H.R. REP. NO. 83-1693, at 1-2 (1954); *see also* S. REP. NO. 83-1287, at 2 (1954) (describing similar sentiments of Senator Ferguson, author of the Senate proposal); 100 CONG. REC. 7332 (1954) (statement of Rep. Bolton).

In short, the political philosophy through which the Congress viewed the world when it amended the Pledge was traditionally and quintessentially Jeffersonian.[4] It contended simply that people who recognize a higher power than the State live in greater freedom.[5] By adopting the phrase "under God" in

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[4] The Declaration of Independence is not the only evidence of Jefferson's consistent argument that God was the source of inalienable rights. For example, shortly before drafting the Declaration of Independence, Jefferson wrote: "The God who gave us life gave us liberty at the same time; the hand of force may destroy, but cannot disjoin them." Thomas Jefferson, On the Instructions Given to the First Delegation of Virginia to Congress, in August, 1774, *reprinted in* 1 THE WRITINGS OF THOMAS JEFFERSON 181, 211 (Albert Ellery Bergh ed., 1904). Later, he questioned: "Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?" Thomas Jefferson, Notes on Virginia, Query XVIII (1782), *reprinted in* 2 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 1, 227.

[5] The House Report quotes from two men who helped shape this country early in its history. William Penn said, "'Those people who are not governed by God will be ruled by tyrants.'" H.R. REP. NO. 83-1693, at 2 (1954); *see also* 100 CONG.

the Pledge, Congress explicitly sought to draw a distinction between Madison and Jefferson's "natural rights" philosophy, on which the U.S. system is based, and the Soviet view that rights, such as they are, are conferred at the pleasure of the State.[6]

The Executive Branch has also followed that tradition.[7]

REC. 7333 (statement of Rep. Oakman (quoting William Penn)). George Mason explained: "'All acts of legislature apparently contrary to the natural right and justice are, in our laws, and must be in the nature of things considered as void. The laws of nature are the laws of God, whose authority can be superseded by no power on earth.'" H.R. REP. 83-1693, at 2 (1954); *see also* 100 CONG. REC. 7333 (statement of Rep. Oakman (quoting George Mason)).

[6] The Soviet Union, happily, is a threat no more. And the particular urgency the Congress perceived in the Cold War has passed. Nonetheless, the underlying principle of the inalienability of rights remains fundamental to our tradition. Moreover, the present moment is not without its own exigencies, as we engage an entirely different enemy who denies, for different reasons, that liberty is a right given us by the Creator.

[7] For example, Presidents have said the following:

"[M]ay that Being who is supreme over all, the Patron of Order, the Fountain of Justice, and the Protector in all ages of the world of virtuous liberty, continue His blessing upon this nation . . . ." John Adams, Inaugural Address (Mar. 4, 1797), *reprinted in* DAVIS NEWTON LOTT, THE PRESIDENTS SPEAK: THE INAUGURAL ADDRESSES OF THE AMERICAN PRESIDENTS FROM GEORGE WASHINGTON TO GEORGE WALKER BUSH 10, 15 (M. Hunter & H. Hunter eds., 2002).

"We admit of no government by divine right, believing that so far as power is concerned the Beneficent Creator has made no distinction amongst men; that all are upon an equality . . . ." William Henry Harrison, Inaugural Address (Mar. 4, 1841), *reprinted in* LOTT, *supra*, at 81, 82.

"It is . . . for us to be here dedicated to the great task remaining before us . . . that this nation, under God, shall have a new birth of freedom and that government of the people, by the people, for the people, shall not perish from the earth." Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *reprinted in* 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 23, 23 (Roy P. Basler ed., 1953).

"I leave you, hoping that the lamp of liberty will burn in your bosoms until there shall no longer be a doubt that all men are *created free and equal*." Abraham Lincoln, Speech at Chicago, Ill. (July 10, 1858) (emphasis added), *reprinted in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra*, at 484, 502.

This Court has itself reflected and reinforced the tradition that the source of inalienable rights is above the State. That is the very real insight in what is too often assumed to be a throw-away line by Justice Douglas: Our "institutions" do indeed "presuppose a Supreme Being," *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), because they presuppose the existence of a source of rights that is prior to the State.

"Our government rests upon religion. It is from that source that we derive our reverence for truth and justice, for equality and liberty, and for the rights of mankind. Unless the people believe in these principles they cannot believe in our government. There are only two main theories of government in the world. One rests on righteousness, the other rests on force. One appeals to reason, the other appeals to the sword. One is exemplified in a republic, the other is represented by a despotism." Calvin Coolidge, Speech at the Unveiling of the Equestrian Statue of Bishop Francis Asbury (Oct. 15, 1924), *reprinted in* CALVIN COOLIDGE, FOUNDATIONS OF THE REPUBLIC: SPEECHES AND ADDRESSES 149-50 (1968).

"The American people stand firm in the faith which has inspired this Nation from the beginning. We believe that all men have a right to equal right to justice under law and equal opportunity to share in the common good. We believe that all men have the right to freedom of thought and expression. We believe that all men are created equal because they are created in the image of God." Harry S. Truman, Inaugural Address (Jan. 20, 1949), *reprinted in* LOTT, *supra*, at 280, 289.

"[T]he same revolutionary beliefs for which our forbears fought are still at issue around the globe—the belief that the rights of man come not from the generosity of the state, but from the hand of God." John F. Kennedy, Inaugural Address (Jan. 20, 1961), *reprinted in* LOTT, *supra*, at 306, 306.

"We are a nation under God, and I believe God intended for us to be free." Ronald Reagan, First Inaugural Address (Jan. 20, 1981), *reprinted in* LOTT, *supra*, at 340, 344.

"[M]ay He continue to hold us close . . . one people under God, dedicated to the dream of freedom that He has placed in the human heart, called upon now to pass that dream on to a waiting and hopeful world." Ronald Reagan, Second Inaugural Address (Jan. 20, 1985), *reprinted in* LOTT, *supra*, at 345, 350.

"[W]e have always instinctively sensed that God's purpose was bound up with the cause of liberty. The Founders understood this. As Jefferson put it, 'Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?'" George H.W. Bush, Remarks to the National Association of Evangelicals in Chicago, Ill. (Mar. 3, 1992), *available at* http://bushlibrary.tamu.edu/papers/1992/92030301.html.

The decision below is at war with that tradition. If reciting the Pledge is now unconstitutional because it refers to a nation "under God," then reading aloud the Declaration of Independence, which refers to the Creator as the source of our rights, must at least be suspect. That turns the American theory of rights exactly on its head. Such a drastic change in our national ethos must not be undertaken merely at the instigation of the Ninth Circuit, but warrants instead review by this Court.

CONCLUSION

For the foregoing reasons, the writ should be granted.

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In the
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
MICHAEL A. NEWDOW, ET AL.,
Respondent.

ELK GROVE UNIFIED SCHOOL DISTRICT,
and DAVID W. GORDON, Superintendent, EGUSD,
Petitioners,
v.
MICHAEL A. NEWDOW, ET AL.,
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR SANDRA L. BANNING IN SUPPORT OF THE PETITIONS FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the inclusion of the phrase "under God" in the Pledge of Allegiance to the United States Flag violates the Establishment Clause of the First Amendment.

2. Whether a noncustodial parent, who lacks legal authority to determine his child's education or religious upbringing, has Article III standing to challenge the educational practices undertaken by the school in which the custodial parent has chosen to place the child.

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MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS AND STATEMENT OF INTEREST

Sandra L. Banning respectfully moves this Court for leave to file the accompanying *amicus curiae* brief in support of petitioners, the United States of America and the Elk Grove Unified School District.[1] Petitioners have consented to the filing of this brief. Respondent, Michael A. Newdow, has withheld his consent. (Copies of letters granting and withholding consent are on file with the Clerk of this Court.)

Sandra Banning is the mother and sole legal custodian of the minor child identified as Michael Newdow's daughter and as an unnamed plaintiff in Newdow's lawsuit challenging the constitutionality of the Pledge of Allegiance. Ms. Banning seeks leave to file this brief in order to assist the Court in understanding her and, more importantly, her daughter's interests in this case.

In particular, Ms. Banning seeks to make clear that, while she does not object to Newdow challenging the Pledge in his own name based on injuries (if any) that he himself may have suffered, her daughter has not been harmed in any way by saying the Pledge. Because Ms. Banning is the legal custodial parent, Newdow has no right to dictate what is appropriate for her daughter's education or religious upbringing. He also has no right to represent the child in

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[1] Pursuant to Supreme Court Rule 37.6, Sandra L. Banning states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than Sandra Banning and her counsel, has contributed monetarily to the preparation or submission of this brief. A trust fund has been established, however, to help defray the costs and expenses incurred by Ms. Banning in connection with this litigation.

court. Ms. Banning does not want her young child to be involved in Newdow's personal litigation battles.

Ms. Banning also supports the petitions for a writ of certiorari. She believes that the Pledge is an important patriotic expression of American ideals, and she wishes for her daughter to be able to recite the Pledge at school. Ms. Banning is particularly concerned by the undemocratic nature of the court of appeals' decision, which, if permitted to stand, would allow Newdow to impose his own agenda and particular sensibilities on everyone else.

For reasons set forth below, if the Court does not summarily reverse, Ms. Banning urges the Court to grant the petitions for a writ of certiorari and reverse after full briefing and argument.

STATEMENT OF FACTS

A. The History Of Ms. Banning And Newdow's Relationship

Sandra Banning is the mother of the minor child identified as an unnamed plaintiff in this lawsuit and, since February 2002, the child's sole legal custodian. Although respondent, Michael Newdow, is the child's biological father, Ms. Banning and Mr. Newdow have never been married.

Ms. Banning has always been her daughter's primary caregiver, and her daughter has always lived with her. Until she turned five, Newdow had little involvement in his daughter's life and visited infrequently. Ms. Banning and Newdow did not enter into any formal custody arrangements, nor was there any regular co-parenting routine.

When her daughter was two months old, Ms. Banning moved at Newdow's request from Sacramento, California, to

a house Newdow owned in Winston-Salem, North Carolina. Newdow asked Ms. Banning to move purportedly so that he could spend time with his daughter on a regular basis. But soon after Ms. Banning moved, Newdow left to live in Guam for a month. Then, when he returned, he immediately accepted a job in Los Angeles, California, and went to live there. In these early months of his daughter's life, Newdow would visit his daughter for two to four days at a time, every six to eight weeks.

In late 1995, when their daughter was fifteen months old, Ms. Banning returned to Sacramento. During this time, she lived in a house owned by Newdow, which he provided in lieu of making child support payments. Ms. Banning and the child lived on their own, while Newdow traveled and, when he was not traveling, lived in Los Angeles. During this period, Newdow visited Ms. Banning and their daughter every three to six weeks.

In 1999, around the time their daughter turned five, Ms. Banning and the child again moved, this time because Newdow served Ms. Banning with a thirty-day notice ordering her to vacate the house that he owned. Around this same time, Newdow tried to enroll the child in public school in Florida. Newdow told Ms. Banning that he believed their daughter would have a superior opportunity to learn Spanish in Florida schools as compared with California schools. *See* Appl. on Mot. for Reconsid., at 6. Newdow also wanted their daughter to move to Florida in order to involve her in a Florida lawsuit he had filed challenging the constitutionality of the Pledge of Allegiance. *See id.* at 7-8, *see also Banning v. Newdow*, No. 99FL04312 (Sup. Ct. of Sacramento County, California). When Ms. Banning made clear that she did not want to move, Newdow suggested "staggered" schooling, with their daughter commuting between

kindergarten in California and Florida every two weeks. *Id.* at 7-8. Newdow urged Ms. Banning to agree to this unusual arrangement because he recognized that not having the child enrolled in a Florida school would "[a]ffect" his "Pledge case litigation — including the issue of 'standing' — and that [he] would have to re-file in California." *See* Newdow Decl. ¶ 21. (Newdow's Florida lawsuit was dismissed for lack of standing in December 1998. *See Newdow v. United States*, No. 98-6585 (S.D. Fla. Dec. 1, 1998), *aff'd* 207 F.3d 662 (11th Cir. 2000).)

Ms. Banning refused. She did not agree that it was in the child's best interests to leave her home in California, nor did she believe that it was appropriate for a five-year-old child to commute thousands of miles every other week in order to simultaneously attend kindergartens in both Florida and California.

Because Newdow continued to press to have his daughter attend kindergarten in Florida, Ms. Banning sought a court order allowing the child to remain enrolled in a California school. The California Superior Court entered an initial custody order, giving Ms. Banning sole physical custody of their daughter (with limited visitation rights to Newdow), and referred Ms. Banning and Newdow to mediation. The mediators considered the issue and agreed that Ms. Banning's daughter should be permitted to attend school in California. Throughout the next few years, Newdow filed various motions in efforts to impose his own wishes concerning his daughter's school. Then, on February 6, 2002, the court granted Ms. Banning sole legal custody. *See* Pet. App. 90a. The court's decision was based in part on an independent psychological evaluation of both parents that concluded that it was in the child's best interests to be in her mother's sole legal care.

Under the custody order, Ms. Banning has the final say in decisions concerning the child's "health, education and welfare." Pet. App. 90a-91a. While both parents are required to "consult with one another on substantial decisions" relating to "medical . . . psychological and educational needs of [the child]," if "mutual agreement is not reached" on any of these issues, "then Ms. Banning may exercise legal control of [the child] that is not specifically prohibited or inconsistent with the physical custody order." Pet. App. 91a.

B. Newdow's Lawsuit and Ms. Banning's Attempts To Intervene

Since 1999, Ms. Banning's daughter has attended public school in Elk Grove, California. In compliance with state law and local ordinance, the teacher leads Ms. Banning's daughter and other students in reciting the Pledge each day as a "patriotic exercise." No student is compelled to recite the Pledge or forced to say the words "under God." Pet. App. 28a.

Shortly after his daughter started kindergarten, Newdow resurrected his challenge to the Pledge—this time in California federal court. He filed this lawsuit seeking a declaration that the 1954 statute adding the words "under God" to the Pledge is facially unconstitutional under the Establishment and Free Exercise Clauses of the First Amendment. According to Newdow, recitation of the Pledge constitutes the "daily indoctrination" of his daughter with "religious dogma." Compl. ¶ 71. Newdow asserted that having his daughter voluntarily recite the Pledge infringed on his "unrestricted right to inculcate in his daughter—free from governmental interference—the atheistic beliefs he finds persuasive." *Id.* ¶ 78.

Despite the fact that the custody order requires both parents to consult on any substantial decision regarding their daughter's education, Newdow never told Ms. Banning before filing his suit of his decision to list their daughter in his Complaint as "an unnamed plaintiff whom he represents as 'next friend.'" *Id.* ¶ 9. As a result, Ms. Banning did not learn that their daughter was involved in Newdow's litigation until the Ninth Circuit issued its panel opinion. *See* Banning Supp. Aff. ¶ 4. While Ms. Banning was well aware of Newdow's atheistic beliefs and his desire to challenge the Pledge's constitutionality, she did not realize that Newdow had used their daughter as a plaintiff in his suit. *See id.* ¶¶ 5-9.

When Ms. Banning discovered that Newdow had brought a lawsuit purportedly on their daughter's behalf, she promptly retained counsel to represent her in federal court and, on August 5, 2002, sought leave to intervene in this litigation. To protect the child, she requested that the Ninth Circuit either grant her motion to intervene, or dismiss the child as an unnamed plaintiff and party to the lawsuit.

Newdow opposed the intervention on the grounds that he had filed a motion for a change of custody, hoping to render moot Ms. Banning's motion to intervene. *See* Banning Supp. Aff. ¶ 2. Newdow's change-of-custody motion was heard by the California Superior Court on August 21, 2002. *See id.* ¶ 3. At this hearing, the court denied the motion and refused to modify the existing custody order. *See id.*

The court then scheduled a second hearing to decide whether Newdow had the right to involve his daughter as her "next friend" in his challenge to the Pledge. After a full hearing on the issue, the court concluded that it was not in the child's best interests to be involved in the litigation. Because there was evidence that the child could potentially

be harmed, and because Ms. Banning did not agree that their daughter should participate, the court held that, even assuming Newdow had joint legal custody (although, in fact, Ms. Banning had sole legal custody), Newdow was not permitted to involve the child as a party to his lawsuit. *See* Pet. App. 91a; *see also* Banning Supp. Aff. ¶ 3(a). The court denied Newdow's motion for reconsideration and affirmed its ruling on September 25, 2002. *See* Banning Supp. Aff. ¶ 3(a).

C. The Ninth Circuit's Decisions

Meanwhile, on June 26, 2002, a divided panel of the Ninth Circuit concluded that Newdow had standing to challenge Elk Grove's policy of reciting the Pledge, and to challenge the facial constitutionality of the 1954 Act amending the Pledge. *See* Pet. App. 25a-58a.

In a separate decision entered on December 4, 2002, the Ninth Circuit panel revisited the question of Newdow's standing in light of Ms. Banning's motion to intervene. *See* Pet. App. 89a-98a. It held that, as a non-custodial parent, Newdow retained "some parental rights" and "may have standing to maintain a federal lawsuit to the extent that his assertion of retained parental rights under state law is not legally incompatible with the custodial parent's assertion of rights." Pet. App. 94a. The panel also made clear that "Newdow cannot name his daughter as a party to a lawsuit against Banning's wishes." Pet. App. 96a.

The Ninth Circuit nonetheless held that Newdow's legal status as a non-custodial parent did not deprive him of standing in his own right to challenge the constitutionality of the Pledge. According to the panel, Newdow suffered cognizable injury in fact because "[t]he pledge to a nation 'under God,' with its imprimatur of governmental sanction,

provides the message to Newdow's young daughter not only that non-believers, or believers in non-Judeo-Christian religions, are outsiders, but more specifically that her *father's* beliefs are those of an outsider, and necessarily inferior to what she is exposed to in the classroom." Pet. App. 97a (emphasis in original).

SUMMARY OF ARGUMENT

Sandra Banning has *sole* legal custody of her daughter. Accordingly, Ms. Banning, not Newdow, has the right and responsibility to decide ultimately where her daughter goes to school and what education her daughter should receive. It is therefore significant that neither Ms. Banning nor her daughter objects to saying the Pledge. To the contrary, Ms. Banning believes that the Pledge is an important, patriotic expression of American ideals that reflects the democratic beliefs of a diverse society. Ms. Banning wants her daughter to appreciate, and participate in, the traditional recitation of the Pledge.

If the Court grants certiorari, Ms. Banning intends to file an *amicus* brief discussing reasons why the Pledge is constitutional under settled Establishment Clause principles. In particular, Ms. Banning will explain that, as this Court has repeatedly recognized, the words "under God" in the Pledge are not intended to establish any religion, but to invoke certain civic ideas and ideals. These ideas and ideals appear and reappear in the most central documents of the American political tradition, which (like the Pledge) recognize the religious beliefs and practices of the American people as an ineradicable dimension of our national history and culture.

ARGUMENT

I. IN CONSIDERING THE PETITION, THE COURT SHOULD BE AWARE OF THE INTERESTS OF MS. BANNING AND HER DAUGHTER

Newdow's lawsuit challenging the constitutionality of the Pledge was brought on behalf of his daughter, purportedly as her "next friend." Compl. ¶ 9. Newdow lacks authority, however, to sue on his daughter's behalf. The undisputed facts show that Ms. Banning, not Newdow, has sole legal custody of their daughter. And neither Ms. Banning, nor her daughter, objects to saying the Pledge.

A. Ms. Banning Has Sole Legal Custody Of Her Daughter

Ms. Banning is the "sole legal custod[ian]" of her daughter. She alone has the ultimate right "to make the decisions relating to" her daughter's "health, education and welfare." Cal. Family Code § 3006 (West 1994). Indeed, the custody order entered by the California Superior Court specifically determined that it was not in the child's best interest either for Newdow to have legal custodial rights or for him to be able to involve his daughter in his litigation adventures.

Nonetheless, Ms. Banning has encouraged Newdow to be a positive influence in his daughter's life. She has consulted with Newdow on substantial decisions relating to their daughter's psychological and educational needs. *See* Pet. App. 91a. She has not sought to prevent Newdow from discussing his beliefs about religion or politics with their daughter when he visits.

But where, as here, the two parents are unable to reach agreement with respect to their child's upbringing, it is

unequivocally Ms. Banning's prerogative and responsibility, as sole legal custodial parent, to decide what is in the child's best interest. As a matter of state law, the legal custodial parent alone has the right to decide ultimately which school the child will attend. She also has sole authority to make ultimate decisions concerning what religious education the child should receive. *See In re Marriage of Murga*, 103 Cal. App. 3d 498, 505 (1980).

B. Neither Ms. Banning Nor Her Daughter Objects To The Pledge Of Allegiance

Neither Ms. Banning nor her daughter objects to saying the Pledge in the course of daily patriotic exercises in public school. To the contrary, Ms. Banning has always believed—and has taught her child—that the Pledge embodies an important expression of American ideals. In her view, the Pledge has long been part of the fabric of our society, and thus reciting the Pledge is rooted in this country's fundamental traditions. In particular, Ms. Banning considers the Pledge a part of the American tradition of inclusiveness—one that reflects the democratic beliefs of a diverse society.

Although Ms. Banning is a Christian, and intends to raise her daughter in the Christian faith, Ms. Banning does not expect her daughter to be inculcated with religious beliefs through reciting the Pledge at school. Such inculcation properly occurs at home and church. The Pledge, in contrast, is an expression of patriotic sentiment consistent with a wide range of religious and moral values.

It bears emphasis that Ms. Banning has never stood in the way of Newdow sharing with their daughter his own views with respect to religion. Ms. Banning understands that her daughter, when she reaches an appropriate age, will have to

decide for herself what religious and moral values to embrace. But Ms. Banning also wants to instill in the child an appropriate understanding and respect for the ideals, principles, and spirit on which this country was founded. Just as Ms. Banning wishes her daughter to celebrate the traditional Thanksgiving holiday, Ms. Banning also wants her daughter to participate in the traditional recitation of the Pledge. In Ms. Banning's view, reciting the Pledge (like celebrating Thanksgiving) is a patriotic recognition of the most fundamental beliefs and practices of the American people that are an important aspect of our national history and culture.

Ms. Banning is therefore profoundly concerned about the undemocratic character of the court of appeals' decision. California law permits individual school districts to choose their own "patriotic exercises." Pet. App. 3a n.1; *see also* Cal. Educ. Code § 52720 (West 1989). And the Elk Grove school district gives parents and their children the right to decide for themselves, based on their own consciences, whether or not to say the Pledge, or even whether to say the Pledge, but not the words "under God." Pet. App. 28a. Ms. Banning agrees with this flexible policy, which ensures that reciting the Pledge is voluntary, not compulsory.

Newdow, however, seeks to impose his own idiosyncratic agenda on everyone else. He would force *all* public schools to banish entirely any statement that might be construed as a reference to religious values, no matter how benign, latitudinarian, or important that expression to the inculcation of civic virtue. Newdow also seeks to prevent schools from using the Pledge to acknowledge practices dear to the American people as a central aspect of our national history and culture.

More immediately, Newdow would use his beliefs to interfere directly with Ms. Banning's wishes that her child participate in traditional patriotic practices. While Ms. Banning has decided that her daughter should attend a public school where the Pledge is recited, Newdow would effectively usurp the right, impose his own will, and negate the choice that Ms Banning enjoys, as the child's legal custodian.

Accordingly, if Newdow has any right to challenge the Pledge at all, it must be a right grounded in a case brought in his own name and based on injuries (if any) he himself may have suffered. *Cf. Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) ("Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children"). Because neither Ms. Banning nor her daughter objects to the Pledge, and because Ms. Banning is the child's sole legal custodian, Newdow should not be permitted to use his daughter in his efforts to impose his own private notions on the entire body of California school children.

II. IF THE COURT GRANTS CERTIORARI, MS. BANNING WILL DISCUSS THE REASONS WHY THE PLEDGE IS CONSTITUTIONAL

If the Court grants the petitions for certiorari, Ms. Banning will address at the merits stage the underlying substantive issue under settled Establishment Clause principles. In particular, she will argue that allowing schoolchildren voluntarily to recite the Pledge is not an impermissible establishment of religion, but, on the contrary, is an expression of patriotism.

Briefly stated, this Court has repeatedly recognized that the reference to "under God" in the Pledge is designed to

invoke certain civic ideas and ideals. These ideas appear and reappear in the most central documents of the American political tradition, including the Declaration of Independence, the Gettysburg Address, and the Constitutions of numerous states. *See* Pet. App. 70a; *cf. Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962). Among others, these ideas include the notion (i) that there is a superhuman ordering to human affairs, which governs the destiny of nations; (ii) that citizens should commit themselves to the interests of their country beyond what might be required by their own narrow sphere of self-interest; and (iii) that there is a fundamental human dignity in each and every person. Significantly, these ideas are the common heritage of many systems of belief.

As Justice Brennan noted almost twenty years ago, the words used in the Pledge should be understood, not as conveying some fixed "religious content," but rather as a means to "inspiring commitment" to American ideals. *Lynch v. Donnelly*, 465 U.S. 668, 716-17 (1984) (Brennan, J., dissenting). The words "under God" in the Pledge are also part of a long-held tradition of recognizing, in an especially appropriate way, the religious beliefs and practices of the American people as an ineradicable dimension of our national history and culture. *See Marsh v. Chambers*, 463 U.S. 783 (1983).

Accordingly, rather than allowing Newdow to impose his particularistic views on everyone else, this Court's Establishment Clause jurisprudence has reflected a more nuanced approach. Were it to address the merits, this Court should remain true to this well-charted course. Most importantly, it should continue to assiduously respect individuals' freedom of conscience, while at the same time protecting the nation's right to summon up its history, tradition, and civic ideals.

CONCLUSION

For the foregoing reasons, the court of appeals' decision should be summarily reversed. Alternatively, the petitions for a writ of certiorari should be granted.

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Nos. 02-1574 and 02-1624

Supreme Court, U.S.
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In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL A. NEWDOW, *et al.*,

Respondents.

ELK GROVE UNIFIED SCHOOL DISTRICT, and DAVID W. GORDON, Superintendent, EGUSD,

Petitioners,

v.

MICHAEL A. NEWDOW,

Respondent.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF IDAHO GOVERNOR DIRK KEMPTHORNE, UNITED STATES SENATOR LARRY CRAIG, UNITED STATES SENATOR MIKE CRAPO, UNITED STATES REPRESENTATIVE MIKE SIMPSON, UNITED STATES REPRESENTATIVE C.L. "BUTCH" OTTER, PRESIDENT PRO TEMPORE OF THE IDAHO STATE SENATE ROBERT L. GEDDES, AND SPEAKER OF THE IDAHO STATE HOUSE OF REPRESENTATIVES BRUCE NEWCOMB AS AMICI CURIAE IN SUPPORT OF PETITIONS OF THE UNITED STATES AND THE ELK GROVE UNIFIED SCHOOL DISTRICT, *ET AL.*

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QUESTIONS PRESENTED

This case arises from a constitutional challenge to a patriotic activity regularly practiced in California classrooms and sanctioned under the California Education Code. The statute, section 52720, authorizes elementary school children to recite the Pledge of Allegiance to the United States in order to discharge "appropriate patriotic exercises," CAL. EDUC. CODE § 52720 (West 1989), at the beginning of the school day. The Pledge of Allegiance, as it is performed in California and throughout schools across the United States, is an act of Congress describing the United States as "one nation under God." 4 U.S.C. § 4 (1998). These petitions present the Court with an opportunity to reconcile divergent perspectives on this issue by circuit courts of appeal and afford clarity under the law as to the nature and extent the Establishment Clause of the First Amendment accommodates patriotic exercises performed in California and elsewhere. The petitions also raise an important question of national import because the Pledge of Allegiance, as enacted by Congress, is regularly recited by school children throughout the United States under state law similar to the California statute scrutinized in this case.

Amici will address the following questions:

1. Whether the inclusion of the phrase "under God" in the Pledge of Allegiance to the United States Flag violates the Establishment Clause of the First Amendment.

QUESTIONS PRESENTED – Continued

2. Whether a noncustodial parent, who lacks the legal authority to determine his child's education or religious upbringing, has Article III standing to challenge educational practices undertaken by the school in which the custodial parent has chosen to place the child.

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Pursuant to Supreme Court Rule 37, amici curiae Governor Dirk Kempthorne, *et al.*, submit this brief in support of Petitioners United States of America and Elk Grove Unified School District, *et al.*, having obtained the written consent of both petitioners and respondent. The letters of consent have been filed with the Clerk of this court.[1]

IDENTITY OF AMICI CURIAE

Amici curiae are Idaho's chief executive, the state's entire delegation to the United States Congress, and Idaho's State legislative leadership.

Amicus Dirk Kempthorne is the duly-elected Governor of the State of Idaho and is a former United States Senator. As Governor, he is required to "see that the laws are faithfully executed." IDAHO CONST. art. IV, § 5. Idaho has a statutory requirement that the state's schoolchildren learn the Pledge of Allegiance to the flag of the United States. Governor Kempthorne signed that legislation into law on April 17, 2000. *See* H.B. 655, 55th Leg. 2d Sess., 2000 Idaho Sess. Laws 1449 (codified as amended as IDAHO CODE § 33-1602 (Michie 2001)).

[1] Pursuant to Supreme Court Rule 37.6, Amici affirm that no counsel for any party in this case authored this brief in whole or in part and that furthermore, no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Amicus United States Senator Larry Craig is the senior member of Congress from the State of Idaho. Senator Craig has been a member of the United States Senate for twelve years and was recently elected to his third consecutive term in November 2002. Prior to becoming a United States Senator, Senator Craig was a member of the United States House of Representatives. He begins his daily legislative business by reciting the Pledge of Allegiance on the Senate floor as well as participating in a prayer led by the Chaplain of the United States Senate.

Amicus Mike Crapo also serves the people of Idaho as a United States Senator. Prior to being elected to the United States Senate, he was a three-term member of the United States House of Representatives. Senator Crapo was elected to Congress after having served as the President Pro Tempore of the Idaho State Senate, a body of the legislative branch of Idaho government that begins each legislative day with a prayer. As with his other colleagues, Senator Crapo begins his legislative day on the floor of the United States Senate with the Pledge of Allegiance.

Amicus United States Representative Mike Simpson is the former Speaker of the Idaho House of Representatives. He served fourteen years as a state legislator and was elected Speaker of the House for three sessions of the Idaho Legislature. As Speaker, he presided over the Idaho House of Representatives in a daily prayer prior to the start of each legislative day of business. In his present position, Congressman Simpson begins his legislative day on the floor of the United States House of Representatives by reciting the Pledge of Allegiance.

Amicus C.L. "Butch" Otter is also a member of the United States House of Representatives from the State of Idaho. Prior to being elected to Congress, Representative Otter was the Lieutenant Governor of Idaho and

performed the duties of acting Governor on numerous occasions. As Lieutenant Governor and President of the Senate for four four-year terms, he presided over a daily prayer in the Idaho State Senate. As a member of the House of Representatives, he also begins his daily legislative business with the Pledge of Allegiance.

Amicus Robert L. Geddes is the President Pro Tempore of the Idaho State Senate. During Idaho's 2000 legislative session, he voted for and supported House Bill 655 which enacted Idaho's citizenship legislation providing for citizenship education—including the Pledge of Allegiance—in Idaho's schools. President Pro Tempore Geddes also supported a change to Senate Rule 4 during the 2003 legislative session which added the Pledge of Allegiance to the second order of business in the Idaho State Senate.

Amicus Bruce Newcomb is the Speaker of the Idaho House of Representatives, a position he has held for three terms. As the Speaker of the Idaho House of Representatives, Idaho's largest legislative body, Speaker Newcomb presides over the daily prayer by the House Chaplain at the start of the legislative day of business. Speaker Newcomb also voted for and strongly supported House Bill 655, Idaho's citizenship education law, during the state's 2000 legislative session.

INTEREST OF AMICI CURIAE

Amici hail from the State of Idaho, a state which requires as a matter of its fundamental constitutional construct that no "preference be given by law to any religious denomination or mode of worship." IDAHO CONST. art. I, § 4. As elected officials of state and federal government, the laws are entrusted to the Amici for their deliberate construction and lawful application.

The Pledge of Allegiance plays an integral part of the citizenship education for children in Idaho public schools. Amici are well familiar with the process by which federal laws are impressed upon on the states, and they understand that the words "under God" in the Pledge represent an important affirmation by Congress that the Framers of the Constitution never designed the United States to be a nation *void* of any acknowledgement of God in our public and free society.

Amici are vitally interested in maintaining the Pledge of Allegiance as an important part of the social and moral fabric of Idaho, a state which is immediately impacted by this case because it falls within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

This case, if it were to stand, will degrade an important observance of Idaho's heritage and culture. This outcome is particularly worrisome because it comes more than two centuries after the birth of a Republic in which its patriarchs freely evoked God in the many writings and organic documents which became the blueprint for the new Nation. Amici can offer a unique perspective on why the decision below should be reviewed as well as why the issues in the case are of the highest importance to the State of Idaho and the United States of America.

SUMMARY OF ARGUMENT

The State of Idaho provides mandatory citizenship and patriotism education in its public schools. By operation of state law, Idaho affords the opportunity for its students to recite the Pledge of Allegiance, sing the National Anthem or "America the Beautiful" in a public

school setting. IDAHO CODE § 33-1602(2) (Michie 2001) (as amended by H.B. 655, 55th Leg. 2d Sess., 2000 Idaho Sess. Laws 1449). The holding in this case has essentially eviscerated key components of Idaho's mandatory patriotism curriculum.

Amici support the petitions for writ of certiorari filed in this case. Additionally, Amici support all of the grounds offered supporting attention to this case by the Court, including the standing of the Respondent to bring this action in the first instance as well as the suggestion by the Petitioners for summary reversal as an appropriate disposition of this matter.

Amici specifically address three separate justifications for certiorari review. First, as clearly articulated by both Petitioners, the decision directly conflicts with a 1992 case from the United States Court of Appeals for the Seventh Circuit, *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Township*, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993).

Second, state courts that have reviewed similar Establishment Clause challenges under the lens of the First Amendment have accommodated the acknowledgement of God in a public setting, under similar grounds as the Seventh Circuit Court of Appeals did in *Sherman*.

Third, this case presents a federal law question of exceptional importance significantly impacting the States. In addition to Idaho, a considerable majority of the United States have a statutory expression encouraging (and in some instances, *requiring*) public school patriotism education in which the Pledge of Allegiance is an essential element. *See generally*, Appendix. Some states have enacted the complete language of the Pledge of Allegiance

with the words "under God" directly into their statutory infrastructure.

Accordingly, because this case directly conflicts with an existing opinion of the United States Court of Appeals and also presents an extraordinarily important federal law question that should be settled by this Court, review on certiorari is warranted.

REASONS FOR GRANTING THE PETITIONS

I. INTRODUCTION: THE PLEDGE OF ALLEGIANCE AND ITS CRITICAL IMPORTANCE FOR CITIZENSHIP EDUCATION IN THE STATE OF IDAHO

Our Nation's Founding Fathers declared independence from Great Britain by proclaiming to be ever mindful of man's "equal station to which the Laws of Nature and of *Nature's God* entitle them," THE DECLARATION OF INDEPENDENCE (U.S. 1776) (emphasis added), and also professed that one of the self-evident truths is that such men "are endowed *by their Creator* with certain unalienable rights," *id.*, para. 2 (emphasis added).

The Preamble to the Constitution of the State of Idaho declares that "We, the people of the state of Idaho, *grateful to Almighty God* for our freedom, to secure its blessings and promote our common welfare do establish this Constitution." IDAHO CONST. pmbl. (emphasis added). As with the Nation's Founding Fathers, so too did the framers of the Idaho Constitution acknowledge that the process of constructing its essential governmental infrastructure required divine intercession in order to ensure its success.

The California statute reviewed in this case, CAL. EDUC. CODE § 52720 (West 1989), *see* App., *infra*, at 3-4, is a mirror image to an Idaho provision which requires patriotism education in all of the state's elementary and secondary schools. Title 33, section 1602 of the Idaho Code provides in part that:

> (2) Instruction in the proper use, display and history of and respect for the American flag and the national colors *shall be given* in all elementary and secondary schools. Such instruction *shall* include the pledge of allegiance to the flag, the words and music of the national anthem, and of "America."
>
> . . .
>
> (4) Every public school *shall* offer the pledge of allegiance or the national anthem in grades one (1) through twelve (12) at the beginning of each school day.

IDAHO CODE § 33-1602(2), (4) (Michie 2001) (emphasis added). *See* App., at 8-9 (setting forth the complete statute).

However, mindful that the Idaho Constitution prohibits any marginalization of an individual's "right, privilege, or capacity on account of his religious opinions," IDAHO CONST. art. I, § 4, the statute further provides that "No pupil shall be compelled, against the pupil's objections or those of the pupil's parent or guardian, to recite the pledge of allegiance or to sing the national anthem." IDAHO CODE § 33-1602(5) (Michie 2001). *See also W. Va. State Bd. of Educ. v. Barnett*, 319 U.S. 624 (1943) (children may not be compelled to salute the flag and recite the Pledge of Allegiance as a prerequisite to public school attendance).

Thus, even with Idaho's strong public policy that her young people be well-grounded and learned in the Nation's founding principles, that same policy provides an equally strong and appropriate religious and philosophical accommodation to those who may object to having to recite the Pledge of Allegiance or sing the National Anthem.

The practical impact of Idaho's current citizenship curriculum in elementary and secondary schools is that (if they so choose), young people throughout the state begin each day with some acknowledgment of a divine nexus for the creation and protection of our Country. In addition to perhaps reciting "one nation, under God" in the Pledge of Allegiance, some Idaho school children may fulfill their patriotic curriculum requirement under title 33, section 1602 of the Idaho Code by singing the words and music of the National Anthem,[2] or "America the Beautiful."[3]

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[2] The Star Spangled Banner's third verse reads:

> Oh! thus be it ever, when freemen shall stand Between their loved homes and the war's desolation! Blest with victory and peace, may the heaven-rescued land Praise the Power that hath made and preserved us a nation. Then conquer we must, for our cause it is just, And this be our motto: "*In God is our trust*" And the star-spangled banner forever shall wave O'er the land of the free and the home of the brave!

Francis Scott Key, Star Spangled Banner (Sept. 20, 1814) (emphasis added).

[3] The first chorus to "America" is sung, "America! America! *God shed His grace on thee.*" The second chorus is sung, "America! America! *God mend thine every flaw.*" The third chorus is: "America! America! *May God thy gold refine.*" The fourth and final chorus is identical to the first. Katherine Lee Bates, America the Beautiful (1913) (emphasis added).

The consequence of the circuit court's holding in this case is that each of the options expressly afforded in Idaho's classrooms to teachers and students for education in the heritage of the United States has become effectively *eviscerated*.[4]

II. THIS CASE WARRANTS REVIEW ON CERTIORARI

Amici fully support the petitions for writ of certiorari filed with the Court in this case. Amici support all of the grounds offered supporting attention to this case by the Court, including the issue of standing of the Respondent to bring this action in the first instance as

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[4] One irony of the Court's decision is that Idaho school children could now be forced to seek refuge in *religious* schools to recite the Pledge of Allegiance enacted by Congress and receive the State's citizenship curriculum under title 33, section 1602 of the Idaho Code.

However, Idaho school districts are also afforded the opportunity to set forth their particular policies regarding religious practices, as exemplified by the following pronouncement from the Boise City School District:

> The District shall respect the right of each individual to follow his/her own beliefs, as long as the beliefs do not infringe upon the rights of others or disrupt the educational process. Information about various religions may be made available to students as appropriate to the students' grade level and course of study. Any discussion or study of religion or other beliefs shall be offered in a fair and objective manner, consistent with learning objectives and free from sectarian influence.

Independent School District of Boise City, Policies and Administrative Procedures Number 2190 (Rev. Aug. 2001).

well as the suggestion by the Petitioners for summary reversal as an appropriate disposition of this matter.

However, three separate bases for certiorari review are addressed below. First, because the circuit courts of appeals diverge on the precise issue of law presented by this case, the Court's supervisory power should be exercised in this instance and the holdings reconciled. Second, state courts that have reviewed similar Establishment Clause challenges—including one to the Pledge of Allegiance—have relied upon established federal case law and upheld reasonable invocation of God in public settings. Finally, this case presents a federal law question of exceptional importance significantly impacting the states which should be settled by this Court.

A. This Case Directly Conflicts With an Existing Opinion by Another Court of Appeals

As duly noted by Petitioners United States and Elk Grove School District, in an almost identical case decided a decade ago, the Seventh Circuit in *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Township*, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993), held that the Establishment Clause accommodated a 1979 Illinois statute which required that the Pledge of Allegiance be led by teachers, provided that the students were free to not participate. Because this case is inapposite to *Sherman*, it is in conflict with the decision of another United States Court of Appeals on the same important matter and thus warrants certiorari review.

The need to reconcile the instant case with *Sherman* is even more critical given the late hour by which this

particular issue was decided by the circuit court below. Since Congress amended the Pledge of Allegiance in 1954, several lower federal courts have entertained Establishment Clause challenges to that legislative act.[5] Notwithstanding previous treatment of this issue by the federal judiciary—including the Seventh Circuit in *Sherman*—the Ninth Circuit recently held that the First Amendment was violated even though Congress originally acted almost a half century ago.[6] Just as *Miranda* warnings have "become part of our national culture," *Dickerson v. United States*, 530 U.S. 428, 443 (2000), this Court should not hesitate to settle the legitimacy of a congressional act which has perhaps become an even more important part of our national tradition after the events that occurred on September 11, 2001.

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[5] For example, a California *district court* long ago dismissed a challenge similar to that presented here in *Smith v. Denney*, 280 F.Supp. 651 (E.D. Cal. 1968).

[6] In rejecting an Establishment Clause challenge to the Ohio state motto "With God All Things are Possible," the Sixth Circuit recently noted that:

> We should also be *amazed* if the Supreme Court were now to question the constitutionality of the Act of June 14, 1954 (68 Stat. 249), codified at [4 U.S.C. § 4]. That is the statute, enacted two years before enactment of Ohio's motto statute, in which Congress, taking a leaf from the Gettysburg Address, amended the Pledge of Allegiance by inserting the phrase "under God" between "one Nation" and "indivisible."

Am. Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Bd., 243 F.3d 289, 301 n.10 (6th Cir. 2001) (*en banc*) (emphasis added).

The decision below by the Ninth Circuit Court of Appeals cannot be a correct result under the First Amendment because "[t]he people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety." *Chaudhuri v. Tennessee*, 130 F.3d 232, 236 (6th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998). The Founders never intended that the Establishment Clause of the First Amendment would be offended, when over a century and a half later, Congress inserted the words "under God" into the Pledge of Allegiance. *See* Pub. L. No. 396, under 68 Stat 249 (1954).

B. State Courts Reviewing Similar Establishment Clause Challenges Have Accommodated the Acknowledgment of God in a Public Setting

A conflict in the federal circuit courts over whether the Pledge of Allegiance can be recited in schools will necessarily undermine well-settled state court jurisprudence which has developed in this and similar contexts.

Shortly after Congress amended the Pledge in 1954, a New York Supreme Court assessed its application in public schools in *Lewis v. Allen*, 159 N.Y.S.2d 807 (1957). An education regulation was amended after Congress acted to include the language of the Pledge verbatim into the regulation and was thus applied in public school patriotic exercises under the predecessor to section 802 of the New York Education Law. *See* App., *infra*, at 25-26.

The issue before the supreme court was whether the Commissioner of Education was under a duty to revoke and rescind the regulation under the Establishment Clause as well as New York State Constitution. The court

noted in passing that "If I properly apprehend the intent, design and purposes of the First Amendment, it was conceived to prevent and prohibit the establishment of a *State Religion*; it was not intended to prevent or prohibit the growth and development of a *Religious State*." *Lewis*, 159 N.Y.S.2d at 812 (emphasis in original).

Petitioner United States cites *Lynch v. Donnelly*, 456 U.S. 668 (1984) as authority for this Court's assurance that the Pledge comports with the strictures of the Establishment Clause, *see* Petition of United States at 14. Likewise, state high courts have also relied on Lynch's assurance. *See, e.g., Maylon v. Pierce County*, 935 P.2d 1272 (Wash. 1997) (counseling program secular in purpose and on its face but occasionally involving some consensual religious activity by unpaid volunteers did not violate the Establishment Clause); *State of Colorado v. Freedom From Religion Found., Inc.*, 898 P.2d 1013 (Colo. 1995) (monument which displayed the Ten Commandments, donated to the state for a secular purpose but contains a message of both religious and secular value, displayed among other monuments and tributes on the grounds of the State Capitol did not violate Establishment Clause); *King v. Vill. of Waunakee*, 517 N.W.2d 671 (Wisc. 1994) (display of a nativity scene in a public park did not violate the Establishment Clause); and *Conrad v. City and County of Denver*, 724 P.2d 1309 (Colo. 1986) (nativity scene displayed annually on the steps of the Denver City and County Building during the Christmas season did not violate state version of the Establishment Clause).

Clarity in the federal Establishment Clause jurisprudence is crucial to state reviewing courts, especially noting

the breadth and depth of exposure by the states due to the role the Pledge plays in their educational systems. *See* Appendix, *infra*. These petitions have poised this important federal question for appropriate guidance to the state courts.

C. This Case Presents a Federal Law Question of Exceptional Importance that Should Be Settled by this Court Because it Broadly and Significantly Impacts the Individual States

Of course, *certiorari* is "not a matter of right," SUP. CT. R. 10. Such review is appropriate where the case "has decided an important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R. 10(c).

How the 1954 version of the Pledge of Allegiance has become eternally woven into the social fabric of Idaho has already been described. However, the Pledge of Allegiance has also been indelibly etched into the fabric of state patriotism education throughout the country. The majority of the states located within the Ninth Circuit, in addition to California and Idaho, have similar statutory requirements for public school patriotism education which includes recitation of the Pledge of Allegiance. See ALASKA STAT. § 14.03.130(a) (Michie 2000) (App., *infra*, at 1-2). ARIZ. REV. STAT. § 15-506 (West 2002) (App., *infra*, at 2). MONT. CODE ANN. § 20-7-133 (2001) (App., *infra*, at 20-21). NEV. REV. STAT. § 389.040 (2002) (App., *infra*, at 21). WASH. REV. CODE § 28A.230.140 (2000) (App., *infra*, at 39-40). *Id.*

Outside of the Ninth Circuit, the importance of a single federal appellate court deciding that the 1954 amendment to the Pledge is unconstitutional becomes more pronounced. Some states, as a testament to the durability of

the language of the Pledge since 1954, and further relying on the authority of Congress to enact constitutional legislation accommodating of the Establishment Clause, have enshrined the full and complete language of the Pledge of Allegiance into their own state law. *See* ALASKA STAT. § 14.03.130(a) (Michie 2000) (App., *infra*, at 1-2). *See also*, Florida, FLA. STAT. ANN. § 1003.44 (West 2002) (App., *infra*, at 5-7); MD. CODE ANN., EDUC. § 7-105(c)(3) (West 2002) (App., *infra*, at 15-16); MISS. CODE ANN. § 37-13-7 (2001) (App., *infra*, at 19); N.J. STAT. ANN. § 18A:36-3(c) (West 1999) (App., *infra*, at 22-23); OKLA. STAT. ANN. tit. 70 § 24-106 (West 2002) (incorporated by reference 4 U.S.C. § 4) (App., *infra*, at 29); R.I. GEN. LAWS 1956 § 16-22-11(a) (2001) (App., *infra*, at 31-32); S.C. CODE ANN. § 59-1-455 (Law. Co-op. 2000) (App., *infra*, at 32), and WASH. REV. CODE § 28A.230140 (2000) (App., *infra*, at 39-40).

The instant decision, without review, will undoubtedly resonate beyond the Ninth Circuit and into the national jurisprudence. Review by the Court will bring certainty and finality to an important legal issue of national import, and, accordingly, the case well meets the criteria for discretionary review by the Court on a writ of certiorari.

CONCLUSION

For the reasons set forth above the Court should grant certiorari on the petitions of the United States and Elk Grove School District.

Respectfully submitted,

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APPENDIX

Alabama

§ 16-43-5. Students to be afforded opportunity to voluntarily recite pledge of allegiance to United States flag.

> The State Board of Education shall afford all students attending public kindergarten, primary and secondary schools the opportunity each school day to voluntarily recite *the pledge of allegiance to the United States Flag*.

ALA. CODE § 16-43-5 (2001) (emphasis added).

Alaska

Sec. 14.03.130 Display of flags and pledge of allegiance.

> (a) United States and Alaska flags shall be displayed upon or near each principal school building during school hours and at other times the governing body considers proper. The governing body shall require that the pledge of allegiance be recited regularly, as determined by the governing body. A person may recite the following salute to the flag of the United States or maintain a respectful silence: *"I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all."*
>
> (b) A school district shall inform all affected persons at the school of their right not to participate in the pledge of allegiance. The exercise of the right not to participate in the pledge of allegiance may not be used to evaluate a student or employee or for any other purpose.

ALASKA STAT. § 14.03.130(a) (Michie 2000) (emphasis added).

Arizona

15-506. Flag display; recitation of the pledge of allegiance

> School authorities shall purchase a United States flag, flagstaff and appurtenances, display the flag upon or near the school building during school hours and at such other times as they direct and set aside a specific time each day for those students who wish to recite *the pledge of allegiance to the United States flag.*

ARIZ. REV. STAT. ANN. § 15-506 (West 2002) (emphasis added).

Arkansas

6-16-122. American heritage

> a) Local school boards shall allow any teacher or administrator in a public school district of this state to read or post in a public school building, classroom, or event any excerpts or portions of:
>
> (1) The Preamble to the Arkansas Constitution;
>
> (2) The Declaration of Independence;
>
> (3) The United States Constitution;
>
> (4) The Mayflower Compact;
>
> (5) The national motto;
>
> (6) The national anthem;
>
> (7) *The Pledge of Allegiance;*

(8) The writings, speeches, documents, and proclamations of the founding fathers and Presidents of the United States;

(9) Organic documents from the pre-Colonial, Colonial, Revolutionary, Federalist, and post-Federalist eras;

(10) United States Supreme Court decisions; and

(11) Acts of the United States Congress.

(b) There shall be no content-based censorship of American history or heritage in this state based on religious or other references in these writings, documents, and records.

(c) A copy of this section shall be distributed to the superintendent of each school district in the state by the Department of Education, whereupon the superintendents then shall provide a copy to each teacher and each school board member.

ARK. CODE ANN. § 6-16-122 (Michie 1999) (emphasis added).

California

§ 52720. Daily performance of patriotic exercise in public schools

In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the school day, there shall be conducted appropriate patriotic exercises. The giving of *the Pledge of Allegiance to the Flag of*

> *the United States of America* shall satisfy the requirements of this section. In every public secondary school there shall be conducted daily appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy such requirement. Such patriotic exercises for secondary schools shall be conducted in accordance with the regulations which shall be adopted by the governing board of the district maintaining the secondary school.

CAL. EDUC. CODE § 52720 (West 1989) (emphasis added).

Connecticut

§ 10-230. Flags in schoolrooms and schools. Policy on the reciting of the "Pledge of Allegiance".

> (a) Each local and regional board of education shall provide a United States flag for each schoolroom and shall cause such flag to be displayed therein during each day school is in session. Each such board shall also provide each school with a United States flag of silk or bunting, not less than four feet in length, and a suitable flagstaff or other arrangement whereby such flag may be displayed on the schoolhouse grounds each school day when the weather will permit and on the inside of the schoolhouse on other school days, and renew such flag and apparatus when necessary. If any board of education fails to provide either of the flags or the apparatus as required in this section or to renew any such flag or apparatus when necessary for a period of thirty days after the reception by it of written notice from the State Board of Education that such schoolhouse is not provided with such

> flag or apparatus or that such flag or apparatus should be renewed, each member of such board of education who has so received notice shall be fined not more than twenty-five dollars.
>
> . . . (c) Each local and regional board of education shall develop a policy to ensure that time is available each school day for students in the schools under its jurisdiction to recite the "*Pledge of Allegiance*". The provisions of this subsection shall not be construed to require any person to recite the "*Pledge of Allegiance*".

CONN. GEN. STAT. ANN. § 10-230(a), (c) (West 2003) (emphasis added).

Delaware

§ 4105 Salute to flag and pledge of allegiance.

> In the opening exercises of every free public school each morning, the teachers and pupils assembled shall salute and pledge allegiance to the American flag as follows: "*I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation, under God, indivisible, with liberty and justice for all.*"

DEL. CODE ANN. tit. 14, § 4105 (1999) (emphasis added).

Florida

1003.44. Patriotic programs; rules

> (1) Each district school board may adopt rules to require, in all of the schools of the district, programs of a patriotic nature to encourage

greater respect for the government of the United States and its national anthem and flag, subject always to other existing pertinent laws of the United States or of the state. When the national anthem is played, students and all civilians shall stand at attention, men removing the headdress, except when such headdress is worn for religious purposes. The pledge of allegiance to the flag, "*I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all*," shall be rendered by students standing with the right hand over the heart. The pledge of allegiance to the flag shall be recited at the beginning of the day in each public elementary, middle, and high school in the state. Each student shall be informed by posting a notice in a conspicuous place that the student has the right not to participate in reciting the pledge. Upon written request by his or her parent, the student must be excused from reciting the pledge. When the pledge is given, civilians must show full respect to the flag by standing at attention, men removing the headdress, except when such headdress is worn for religious purposes, as provided by Pub. L. ch. 77-435, s. 7, approved June 22, 1942, 56 Stat. 377, as amended by Pub. L. ch. 77-806, 56 Stat. 1074, approved December 22, 1942.

(2) Each district school board may allow any teacher or administrator to read, or to post in a public school building or classroom or at any school-related event, any excerpt or portion of the following historic material: the national motto; the national anthem; *the pledge of allegiance*; the Constitution of the State of Florida, including the Preamble; the Constitution of the United States,

including the Preamble; the Bill of Rights; the Declaration of Independence; the Mayflower Compact; the Emancipation Proclamation; the writings, speeches, documents, and proclamations of the presidents of the United States, the signers of the Constitution of the United States and the Declaration of Independence, and civil rights leaders; and decisions of the United States Supreme Court. However, any material that is read, posted, or taught pursuant to this provision may be presented only from a historical perspective and in a nonproselytizing manner. When less than an entire document is used, the excerpt or portion must include as much material as is reasonably necessary to reflect the sentiment of the entire document and avoid expressing statements out of the context in which they were originally made. If the material refers to laws or judicial decisions that have been superseded, the material must be accompanied by a statement indicating that such law or decision is no longer the law of the land. No material shall be selected to advance a particular religious, political, or sectarian purpose. The department shall distribute a copy of this section to each district school board, whereupon each district school superintendent shall distribute a copy to all teachers and administrators.

FLA. STAT. ANN. § 1003.44 (West 2002) (emphasis added).

Georgia

§ 20-2-310. Student directory information; registering to vote and with selective service; pledge of allegiance.

. . .

(c) (1) Each student in the public schools of this state shall be afforded the opportunity to recite the *Pledge of Allegiance to the flag of the United States of America* during each school day. It shall be the duty of each local board of education to establish a policy setting the time and manner for recitation of the Pledge of Allegiance. Such policy shall be established in writing and shall be distributed to each teacher within the school.

(2) The State School Superintendent shall prepare for the use of the public schools of this state a program of instruction, subject to the approval of the State Board of Education, in the correct use and display of the flag of the United States of America which shall include, as a minimum, specific instruction regarding respect for such flag and its display and use as provided by federal law and regulation, and under such regulations and instructions as may best meet the varied requirements of the different grades in such schools. However, such instruction shall include, as a minimum, the provisions of 36 U.S.C. Sections 170 through 177.

GA. CODE ANN. § 20-2-310(c) (2001) (emphasis added).

Idaho

33-1602 United States Constitution – National flag and colors – National anthem – "America" – Citizenship.

(1) Instruction in the Constitution of the United States shall be given in all elementary and secondary schools. The state board of education shall adopt such materials as may be deemed necessary for said purpose, and shall also

determine the grades in which such instruction shall be given.

(2) Instruction in the proper use, display and history of and respect for the American flag and the national colors shall be given in all elementary and secondary schools. Such instruction shall include *the pledge of allegiance to the flag*, the words and music of the national anthem, and of "America."

(3) Every school board of trustees shall cause the United States flag to be displayed in every classroom during the school hours of each school day.

(4) Every public school shall offer *the pledge of allegiance* or the national anthem in grades one (1) through twelve (12) at the beginning of each school day.

(5) No pupil shall be compelled, against the pupil's objections or those of the pupil's parent or guardian, to recite *the pledge of allegiance* or to sing the national anthem.

[(6)](3) Instruction in citizenship shall be given in all elementary and secondary schools. Citizenship instruction shall include lessons on the role of a citizen in a constitutional republic, how laws are made, how officials are elected, and the importance of voting and of participating in government. Such instruction shall also include the importance of respecting and obeying statutes which are validly and lawfully enacted by the Idaho legislature and the congress of the United States.

IDAHO CODE § 33-1602 (Michie 2001) (emphasis added).

Illinois

§ 27-3. Patriotism and principles of representative government – Proper use of flag – Method of voting – Pledge of Allegiance.

> American patriotism and the principles of representative government, as enunciated in the American Declaration of Independence, the Constitution of the United States of America and the Constitution of the State of Illinois, and the proper use and display of the American flag, shall be taught in all public schools and other educational institutions supported or maintained in whole or in part by public funds. No student shall receive a certificate of graduation without passing a satisfactory examination upon such subjects. Instruction shall be given in all such schools and institutions in the method of voting at elections by means of the Australian Ballot system and the method of the counting of votes for candidates. *The Pledge of Allegiance shall be recited each school day by pupils* in elementary and secondary educational institutions supported or maintained in whole or in part by public funds.

105 ILL. COMP. STAT. ANN. 5/27-3 (West 1998) (emphasis added).

Indiana

20-10.1-4-2.5 Protected writings, documents, and records of American history or heritage

> Sec. 2.5. (a) This section applies to the following writings, documents, and records:
>
> (1) The Constitution of the United States of America.

(2) The national motto.

(3) The national anthem.

(4) *The Pledge of Allegiance.*

(5) The Constitution of the State of Indiana.

(6) The Declaration of Independence.

(7) The Mayflower Compact.

(8) The Federalist Papers.

(9) "Common Sense" by Thomas Paine.

(10) The writings, speeches, documents, and proclamations of the founding fathers and presidents of the United States.

(11) United States Supreme Court decisions.

(12) Executive orders of presidents of the United States.

(13) Frederick Douglas' Speech at Rochester, New York, on July 5, 1852, entitled "What to a Slave is the Fourth of July?".

(14) *Appeal* by David Walker.

(15) Chief Seattle's letter to the United States government in 1852 in response to the United States government's inquiry regarding the purchase of tribal lands.

(b) A school corporation may allow a principal or teacher in the school corporation to read or post in a school building or classroom or at a school event any excerpt or part of a writing, document, or record listed in subsection (a).

(c) A school corporation may not permit the content based censorship of American history or

heritage based on religious references in a writing, document, or record listed in subsection (a).

(d) A library, a media center, or an equivalent facility that a school corporation maintains for student use must contain in the facility's permanent collection at least one (1) copy of each writing or document listed in subsection (a)(1) through (a)(9).

(e) A school corporation:

(1) must allow a student to include a reference to a writing, document, or record listed in subsection (a) in a report or other work product; and

(2) may not punish the student in any way, including a reduction in grade.

IND. CODE § 20-10.1-4-2.5 (2002 Electronic Pocket Part Update) (emphasis added).

Kansas

72-5308. Patriotic exercises; flag etiquette; observation of holidays.

(a) The state board of education shall prepare for the use of the public schools a program providing for patriotic exercises the board deems to be expedient, under such instructions as may best meet the varied requirements of the different grades in such schools. The program of patriotic observation of every school district shall include:

(1) *A daily recitation of the pledge of allegiance to the flag of the United States of America;*

(2) instructions relating to flag etiquette, use and display; and

(3) provisions relating to the observance in public schools of Lincoln's birthday, Washington's birthday, Memorial day, and Flag day and such other legal holidays designated by law.

(b) The state board of education shall adopt any rules and regulations necessary to implement the provisions of subsection (a).

KAN. STAT. ANN. § 72-5308 (1992) (emphasis added).

Kentucky

158.175 RECITATION OF LORD'S PRAYER AND PLEDGE OF ALLEGIANCE; INSTRUCTION IN PROPER RESPECT FOR AND DISPLAY OF THE FLAG; OBSERVATION OF MOMENT OF SILENCE OR REFLECTION

(1) As a continuation of the policy of teaching our country's history and as an affirmation of the freedom of religion in this country, the board of education of a local school district may authorize the recitation of the traditional Lord's prayer *and the pledge of allegiance to the flag* in public elementary schools. Pupil participation in the recitation of the prayer and pledge of allegiance shall be voluntary. Pupils shall be reminded that this Lord's prayer is the prayer our pilgrim fathers recited when they came to this country in their search for freedom. Pupils shall be informed that these exercises are not meant to influence an individual's personal religious beliefs in any manner. The exercises shall be conducted so that

pupils shall learn of our great freedoms, including the freedom of religion symbolized by the recitation of the Lord's prayer.

(2) The board of education of each school district shall establish a policy and develop procedures whereby the pupils in each elementary and secondary school may participate in *the pledge of allegiance to the flag* of the United States at the commencement of each school day.

(3) The Kentucky Board of Education shall develop a program of instruction relating to the flag of the United States of America, including instruction in etiquette, the correct use and display of the flag, and other patriotic exercises as may be related. This program of instruction shall be provided to each public school for use in its course of instruction. The program of instruction, at a minimum, shall include the provisions of 4 U.S.C. secs. 1 to 3 and 4 U.S.C. secs. 5 to 9.

KY. REV. STAT. ANN. § 158.175(1)-(3) (Michie 2001) (emphasis added).

Louisiana

§ 2115. Silent prayer or meditation; pledge of allegiance

A. Each parish, city, and other local public school board in the state shall permit the proper school authorities of each school within its jurisdiction to allow an opportunity, at the start of each school day, for those students and teachers desiring to do so to observe a brief time in silent prayer or meditation. The allowance of a brief time for silent prayer or meditation shall not be intended nor interpreted as state support of or interference with religion, nor shall such time

allowance be promoted as a religious exercise and the implementation of this Section shall remain neutral toward religion.

B. Each parish and city school board in the state shall also permit the proper authorities of each school to allow the opportunity for group recitation of the *"Pledge of Allegiance to the Flag"*. Such recitation shall occur at the commencement of the first class of each day in all grades and in all public schools.

LA. REV. STAT. ANN. § 17:2115 (West 2001) (emphasis added).

Maryland

§ 7-105. Patriotic observances

(a) This section is enacted so that the love of freedom and democracy, shown in the devotion of all true and patriotic Americans to their flag and country, shall be instilled in the hearts and minds of the youth of America.

(b) Each county board shall:

(1) Require the display of an American flag on the site of each public school building in its county while the school is in session;

(2) Buy all necessary flags, staffs, and appliances for the flags; and

(3) Adopt rules and regulations for the proper custody, care, and display of the flag.

(c) Each county board shall:

(1) Provide each public school classroom with an American flag;

(2) Prepare a program for each public school classroom for the beginning of each school day that provides for the salute to the flag and other patriotic exercises that are approved by the United States government; and

(3) Require all students and teachers in charge to stand and face the flag and while standing give an approved salute and recite in unison the pledge of allegiance as follows: "*I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.*"

(d) Any student or teacher who wishes to be excused from the requirements of subsection (c)(3) of this section shall be excused.

(e) Each county board may provide for any other patriotic exercises it considers appropriate under the regulations and instruction that best meet the requirements of the different grades in the schools.

(f) Any individual who commits an act of disrespect, either by word or action, is in violation of the intent of this section.

MD. CODE ANN., EDUC. § 7-105 (2002) (emphasis added).

Massachusetts

§ 69. Display of national flags; pledge of allegiance; penalty for violation

The school committee shall provide for each schoolhouse under its control, which is not

otherwise supplied, flags of the United States of silk or bunting not less than two feet long, such flags or bunting to be manufactured in the United States, and suitable apparatus for their display as hereinafter provided. A flag shall be displayed, weather permitting, on the school building or grounds on every school day and on every legal holiday or day proclaimed by the governor or the President of the United States for especial observance; provided, that on stormy school days, it shall be displayed inside the building. A flag shall be displayed in each assembly hall or other room in each such schoolhouse where the opening exercises on each school day are held. Each teacher at the commencement of the first class of each day in all grades in all public schools shall lead the class in a group recitation of *the "Pledge of Allegiance to the Flag"*. A flag shall be displayed in each classroom in each such schoolhouse. Failure for a period of five consecutive days by the principal or teacher in charge of a school equipped as aforesaid to display the flag as above required, or failure for a period of two consecutive weeks by a teacher to salute the flag and recite said pledge as aforesaid, or to cause the pupils under his charge so to do, shall be punished for every such period by a fine of not more than five dollars. Failure of the committee to equip a school as herein provided shall subject the members thereof to a like penalty.

MASS. GEN. LAWS ch. 71 § 69 (Law. Co-op. Supp. 2000) (emphasis added).

Minnesota

PLEDGE OF ALLEGIANCE. (a) All public and charter school students shall recite *the pledge of allegiance to the flag of the United States of America* one or more times each week. The recitation shall be conducted:

(1) by each individual classroom teacher or the teacher's surrogate; or

(2) over a school intercom system by a person designated by the school principal or other person having administrative control over the school.

A local school board or a charter school board of directors may annually, by majority vote, waive this requirement.

(b) Any student or teacher may decline to participate in recitation of the pledge.

(c) A school district or charter school that has a student handbook or school policy guide must include a statement that anyone who does not wish to participate in reciting the pledge of allegiance for any personal reasons may elect not to do so and that students must respect another person's right to make that choice.

(d) A local school board or a charter school board of directors that waives the requirement to recite the pledge of allegiance under paragraph (a) may adopt a district or school policy regarding the reciting of the pledge of allegiance.

MINN. STAT. § 121A.11(3) (2003) (emphasis added).

Mississippi

§ 37-13-6. United States flag; classroom display; etiquette instruction; recitation of pledge of allegiance

> (1) The flag of the United States shall be displayed in close proximity to the school building, on a proper staff, at all times during the hours of daylight when the school is in session when the weather will permit without damage to the flag. In addition, the flag of the United States shall be displayed in each classroom and in each principal room of the school building at all times while school is in session. It shall be the duty of the school boards of each school district to provide for the flags, proper flag staffs and their proper display. Each school district shall provide student instruction in the proper etiquette toward, correct display of, and respect for the flag, and in patriotic exercises. The instruction shall be a part of the district's fifth grade social studies curriculum or history curriculum, with the assistance of the State Department of Education.
>
> (2) From and after July 1, 2002, the school boards of all public schools of this state shall require the teachers under their control to have all pupils repeat the oath of allegiance to the flag of the United States of America at the beginning of the first hour of class each day school is in session, such oath of allegiance being as follows:
>
> *"I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all."*
>
> Any student or teacher who objects to reciting the oath of allegiance shall be excused from participating without penalty.

MISS. CODE ANN. § 37-13-6 (2002) (emphasis added).

Missouri

171.021. Schools receiving public moneys to display United States flag – requirement to recite Pledge of Allegiance once a week – students not required to recite

> 1. Every school in this state which is supported in whole or in part by public moneys, during the hours while school is in session, shall display in some prominent place either upon the outside of the school building or upon a pole erected in the school yard the flag of the United States of America.
>
> 2. Every school in this state which is supported in whole or in part by public moneys shall ensure that *the Pledge of Allegiance to the flag of the United States of America* is recited in at least one scheduled class of every pupil enrolled in that school no less often than once per week. No student shall be required to recite the Pledge of Allegiance.

MO. REV. STAT. § 171.021 (Supp. 2002) (emphasis added).

Montana

20-7-133. Pledge of allegiance required – exemption for students and teachers

> (1) Except as provided in subsection (4), *the pledge of allegiance to the flag of the United States of America* must be recited in all public schools of the state.
>
> (2) The recitation required in subsection (1) must be conducted at the beginning of the first class:
>
> (a) of each school day in kindergarten through grade 6; and

(b) of each school week in grades 7 through 12.

(3) The recitation must be conducted:

(a) by each individual classroom teacher or the teacher's surrogate; or

(b) over the school intercom system by a faculty member or person designated by the principal.

(4) A school district shall inform all students and teachers of their right to not participate in recitation of the pledge. Any student or teacher who, for any reason, objects to participating in the pledge exercise must be excused from participation. A student or teacher who declines to participate in the pledge may engage in any alternative form of conduct so long as that conduct does not materially or substantially disrupt the work or discipline of the school.

(5) If a student or teacher declines to participate in the recitation of the pledge pursuant to this section, a school district may not for evaluation purposes include any reference to the student's or teacher's not participating.

MONT. CODE ANN. § 20-7-133 (2001) (emphasis added).

Nevada

389.040. Patriotic observance

Each public school shall set aside appropriate time at the beginning of each school day for pupils to *pledge their allegiance to the flag of the United States*. In addition, each public school may set aside appropriate time during the school day for additional patriotic observance.

NEV. REV. STAT. 389.040 (2002) (emphasis added).

New Hampshire

194:15-c New Hampshire School Patriot Act.

> I. As a continuation of the policy of teaching our country's history to the elementary and secondary pupils of this state, this section shall be known as the New Hampshire School Patriot Act.
>
> II. A school district shall authorize a period of time during the school day for the recitation of the pledge of allegiance. Pupil participation in the recitation of the pledge of allegiance shall be voluntary.
>
> III. Pupils not participating in the recitation of the pledge of allegiance may silently stand or remain seated but shall be required to respect the rights of those pupils electing to participate. If this paragraph shall be declared to be unconstitutional or otherwise invalid, the remaining paragraphs in this section shall not be affected, and shall continue in full force and effect.

N.H. REV. STAT. ANN. § 194:15-c (Supp. 2002) (emphasis added).

New Jersey

18A:36-3. Display of and salute to flag; pledge of allegiance

> Every board of education shall:
>
> (a) Procure a United States flag, flagstaff and necessary appliances therefore for each school in the district and display such flag upon or near the public school building during school hours;
>
> (b) Procure a United States flag, flagstaff and necessary appliances or standard therefor for each assembly room and each classroom in each

school, and display such flag in the assembly room and each classroom during school hours and at such other time as the board of education may deem proper; and

(c) Require the pupils in each school in the district on every school day to salute the United States flag and repeat the following pledge of allegiance to the flag: "*I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation, under God, indivisible, with liberty and justice for all,*" which salute and pledge of allegiance shall be rendered with the right hand over the heart, except that pupils who have conscientious scruples against such pledge or salute, or are children of accredited representatives of foreign governments to whom the United States government extends diplomatic immunity, shall not be required to render such salute and pledge but shall be required to show full respect to the flag while the pledge is being given merely by standing at attention, the boys removing the headdress.

N.J. STAT. ANN. § 18A:36-3(c) (West 1999) (emphasis added).

New Mexico

22-5-4.5 Pledge of allegiance.

Local school boards shall provide that *the pledge of allegiance* shall be recited daily in each public school in the school district according to regulations adopted by the state board.

N.M. STAT. ANN. § 22-5-4.5 (Michie 2001) (emphasis added).

New York

§ 802. Instruction relating to the flag; holidays

1. It shall be the duty of the commissioner to prepare, for the use of the public schools of the state, a program providing for a salute to the flag and a daily *pledge of allegiance to the flag*, and instruction in its correct use and display which shall include, as a minimum, specific instruction regarding respect for the flag of the United States of America, its display and use as provided by federal statute and regulation and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such schools. However, such instruction shall include, as a minimum, the provisions of sections one hundred seventy through one hundred seventy-seven of title thirty-six of the United States Code.

2. It shall also be his duty to make special provision for the observance in the public schools of Lincoln's birthday, Washington's birthday, Memorial day and Flag day, and such other legal holidays of like character as may be hereafter designated by law when the legislature makes an appropriation therefore.

3. Nothing herein contained shall be construed to authorize military instruction or drill in the public schools during school hours, except that the board of education of any school district may offer during school hours a junior reserve officer training program in conjunction with the United States Department of Defense to those students in grades nine through twelve who are at least

> fourteen years of age provided that enrollment and participation in such program is voluntary on the part of the student and written consent of a parent or guardian is submitted by such student and further provided, that the conduct of instruction on or the presence within any school of any type of current or future weaponry as part of such program is prohibited.

N.Y. EDUC. LAW § 802 (McKinney 2000) (emphasis added).

North Carolina

§ 115C-47. Powers and duties generally

> In addition to the powers and duties designated in G.S. 115C-36, local boards of education shall have the power or duty:
>
> (1) To Provide an Adequate School System. – It shall be the duty of local boards of education to provide adequate school systems within their respective local . . . school administrative units, as directed by law.
>
> . . . (29) To Authorize the Observance of a Moment of Silence. – To afford students and teachers a moment of quiet reflection at the beginning of each day in the public schools, to create a boundary between school time and nonschool time, and to set a tone of decorum in the classroom that will be conducive to discipline and learning, each local board of education may adopt a policy to authorize the observance of a moment of silence at the commencement of the first class of each day in all grades in the public schools. Such a policy shall provide that the teacher in charge of the room in which each class is held may announce that a period of silence not to

exceed one minute in duration shall be observed and that during that period silence shall be maintained and no one may engage in any other activities. Such period of silence shall be totally and completely unstructured and free of guidance or influence of any kind from any sources.

(29a) To Encourage the Display of the United States and North Carolina Flags, and to Encourage the Recitation of the Pledge or Oath of Allegiance. – Local boards of education are encouraged to adopt policies to (i) provide for the display of the United States and North Carolina flags in each classroom, (ii) provide the opportunity for students to recite *the Pledge* or Oath of Allegiance on a regular basis, and (iii) provide age-appropriate instruction on the meaning and historical origins of the flag and the Pledge of Allegiance. These policies shall not compel any person to stand, salute the flag, or recite the Pledge of Allegiance. If flags are donated or are otherwise available, flags shall be displayed in each classroom.

(29b) To Ensure Freedom of Religion. – No local board of education shall have a policy of denying, or that effectively prevents participation in, prayer in public schools by individuals on a voluntary basis, except when necessary to maintain order and discipline. No local board of education shall encourage or require any person to participate in prayer or influence the form or content of any prayer in public schools. This subdivision shall not be construed to direct any local board of education to take any action in violation of the Constitutions of North Carolina or the United States.

N.C. GEN. STAT. § 115C-47(1), (29)-(29b) (2002) (emphasis added).

North Dakota

15.1-19-03.1 Recitation of prayer – Period of silence – Pledge of allegiance.

> 1. A student may voluntarily pray aloud or participate in religious speech at any time before, during, or after the schoolday to the same extent a student may voluntarily speak or participate in secular speech.
>
> 2. A school board, school administrator, or teacher may not impose any restriction on the time, place, manner, or location of any student-initiated religious speech or prayer which exceeds the restriction imposed on students' secular speech.
>
> 3. A school board may, by resolution, allow a classroom teacher to impose up to one minute of silence for meditation, reflection, or prayer at the beginning of each school day. 4. A school board may authorize the voluntary recitation of the *pledge of allegiance* by a teacher or one or more students at the beginning of each schoolday. A student may not be required to recite the pledge of allegiance, stand during the recitation of the pledge of allegiance, or salute the American flag.

N.D. CENT. CODE § 15.1-19-03.1 (Supp. 2001) (emphasis added).

Ohio

3313.602 POLICY ON ORAL RECITATION OF PLEDGE OF ALLEGIANCE TO FLAG; EMPHASIS ON DEMOCRATIC AND ETHICAL PRINCIPLES; VETERANS' DAY OBSERVANCE

> (A) The board of education of each city, local, exempted village, and joint vocational school district shall adopt a policy specifying whether or not oral recitation of *the pledge of allegiance to the flag* shall be a part of the school's program and, if so, establishing a time and manner for the recitation. The policy adopted under this division shall not require any student to participate in the recitation and shall prohibit the intimidation of any student by other students or staff aimed at coercing participation.
>
> (B) In the development of its graded course of study, the board of education of each city and exempted village school district and the governing board of each educational service center shall ensure that the principles of democracy and ethics are emphasized and discussed wherever appropriate in all parts of the curriculum for grades kindergarten through twelve.
>
> (C) Each city, local, exempted village, and joint vocational school board shall adopt policies that encourage all certificated and noncertificated employees to be cognizant of their roles in instilling ethical principles and democratic ideals in all district pupils.

OHIO REV. CODE ANN. § 3313.602(A)-(C) (West Supp. 2002) (emphasis added).

Oklahoma

§ 24-106. United States flag – Display – Instruction in history and etiquette – Pledge of allegiance

> A. The board of education of every school district in this state shall be required to own and display, either inside or outside each classroom building in the district, a United States Flag.
>
> B. Instruction in the history and etiquette relating to the United States Flag shall be given in one or more grades in the schools in every school district in this state.
>
> C. Students are authorized to recite, at the beginning of each school day, the *pledge of allegiance to the flag of the United States of America* as enumerated at 36 U.S.C., Section 172. Each student shall be informed by posting a notice in a conspicuous place that students not wishing to participate in the pledge shall not be required to do so.

OKLA. STAT. ANN. tit. 70, § 24-106 (West 2002) (emphasis added).

Pennsylvania

§ 7-771. Display of United States flag; development of patriotism

> (a) The board of school directors in each district shall, when they are not otherwise provided, purchase a United States flag, flagstaff, and the necessary appliances therefor, and shall display said flag upon or near each public school building in clement weather, during school hours, and at such other times as the board may determine.

(b) All boards of school directors, all proprietors or principals of private schools, and all authorities in control of parochial schools or other educational institutions, shall display the United States national flag, not less than three feet in length, within all school buildings under their control during each day such schools are in session. In all public schools, the board of school directors shall make all rules and necessary regulations for the care and keeping of such flags. The expense thereof shall be paid by the school district.

(c) (1) All supervising officers and teachers in charge of public, private or parochial schools shall cause the Flag of the United States of America to be displayed in every classroom during the hours of each school day and *shall provide for the recitation of the Pledge of Allegiance* or the national anthem at the beginning of each school day. Students may decline to recite the Pledge of Allegiance and may refrain from saluting the flag on the basis of religious conviction or personal belief. The supervising officer of a school subject to the requirements of this subsection shall provide written notification to the parents or guardian of any student who declines to recite the Pledge of Allegiance or who refrains from saluting the flag.

(2) This subsection shall not apply to any private or parochial school for which the display of the flag, the recitation of the Pledge of Allegiance or the salute of the flag violates the religious conviction on which the school is based.

(d) The supervising officers and teachers in charge of public, private or parochial schools may offer at least one full period per week, for the

> purpose of affirming and developing allegiance to and respect for the Flag of the United States of America, and for the promoting of a clear understanding of our American way of life, with all of the unparalleled individual opportunities, and our republican form of government, with its responsiveness to majority decisions and demands. Such elements shall be included in this program as instruction in the fundamental principles of our form of government, an understanding of the provisions of the Constitution of the Commonwealth of Pennsylvania and the Constitution of the United States of America, the values to be found in the freedom of speech, of religion and of the press, the values to be found in obedience to the laws of the land and the Commonwealth, the importance of exercising the right of franchise, the obligation of every citizen to stand ready to defend our country at all times from infiltration or aggression by those whose acts and ideologies are contrary to our American philosophy of life.

7 PA. CONS. STAT. ANN. § 771 (West 1992) (emphasis added).

Rhode Island

16-22-11 Pledge of allegiance.

> (a) All public schools, commencing with pre-primary school through and including high school, shall commence each day with the following pledge:
>
> *"I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation, under God, indivisible, with liberty and justice for all."*

(b) Any person not wishing to participate in the "pledge of allegiance" is exempt from participation and need not participate in the pledge.

R.I. GEN. LAWS § 16-22-11 (2002) (emphasis added).

South Carolina

§ 59-1-455. Time for pledge of allegiance required.

Beginning with the 1991-92 school year, all public school students, commencing with grades kindergarten through and including high school, shall during the course of each school day's activities at a specific time which must be designated by the local school say the Pledge of Allegiance as follows:

"I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all."

Any person not wishing to say the "Pledge of Allegiance" or otherwise participate in saying the "Pledge of Allegiance" is exempt from participation and may not be penalized for failing to participate.

A person who does not wish to participate may leave the classroom, may remain in his seat, or may express his nonparticipation in any form which does not materially infringe upon the rights of other persons or disrupt school activities.

S.C. CODE ANN. § 59-1-455 (Law. Co-op. 2000) (emphasis added).

South Dakota

13-24-17.2 Right to post flag, recite pledge of allegiance and sing national anthem not to be infringed.

> The right to post the United States flag shall not be limited or infringed upon in any public school classroom, public school building, at any public school event, or on any public school uniform. The right to recite the *pledge of allegiance to the flag of the United States* shall not be limited or infringed upon, and the national anthem may be sung during any school day or school event.

S.D. CODIFIED LAWS § 13-24-17.2 (Michie 2002) (added by S.L. 2002, ch. 87, § 1) (emphasis added).

Tennessee

§ 49-6-1001. American flag and emblems

> (a) All boards of education shall direct and all teachers employed by the public schools shall give instructions to the pupils of the schools, and shall have the pupils study as a part of the curriculum, the uses, purposes and methods of displaying the American flag and other patriotic emblems, and the history and usage of the *pledge of allegiance to the flag of the United States of America*.
>
> (b) In recognition of the civic heritage of the United States of America, all students shall be required to learn the *pledge of allegiance* and to demonstrate such knowledge.
>
> (c)(1) Each board of education shall require the daily recitation of the pledge of allegiance in each classroom in the school system in which a flag is

displayed. Each LEA is encouraged to have a flag in each classroom and patriotic, fraternal, and other organizations or individuals are encouraged to donate flags to schools to enable them to have the flag of the United States of America present in each classroom. Each board of education shall determine the appropriate time during the school day for the recitation of the *pledge of allegiance*. At the time designated for the recitation of the pledge of allegiance, students shall stand and recite the pledge of allegiance while facing the flag with their right hands over their hearts or in an appropriate salute if in uniform; provided, however, that no student shall be compelled to recite the pledge of allegiance if the student or the student's parent or legal guardian objects on religious, philosophical or other grounds to the student participating in such exercise. Students who are thus exempt from reciting the pledge of allegiance shall remain quietly standing or sitting at their desks while others recite the pledge of allegiance and shall make no display that disrupts or distracts others who are reciting the pledge of allegiance. Teachers or other school staff who have religious, philosophical, or other grounds for objecting are likewise exempt from leading or participating in the exercise. If a teacher chooses not to lead the pledge, another suitable person shall be designated either by the teacher or principal to lead the class. Each board of education shall provide appropriate accommodations for students, teachers or other staff who are unable to comply with the procedures described herein due to disability.

(2) The board of education's code of conduct shall apply to disruptive behavior during the recitation of the *pledge of allegiance* in the same

manner as provided for other circumstances of such behavior.

(d)(1) To promote compliance with constitutional restrictions, as well as observance of constitutional rights, the State Board of Education shall, in consultation with the Attorney General and Reporter, develop guidelines on constitutional rights and restrictions relating to the recitation of the *pledge of allegiance to the American flag* in public schools.

(2) The State Board of Education's guidelines shall include, but shall not be limited to, provisions which address the following: the initiative and involvement of local boards of education and individual schools, administrators, teachers, and students; the propriety and constitutionality of any recitation or participation requirements; appropriate etiquette and conventions for respecting the dignity and appropriate display of the flag of the United States; and relevant state and federal constitutional concerns, such as freedom of speech and religion.

TENN. CODE ANN. § 49-6-1001 (2002) (emphasis added).

Texas

Sec. 25.082. SCHOOL DAY; PLEDGES OF ALLEGIANCE; MINUTE OF SILENCE.

. . .

(b) The board of trustees of each school district shall require students, once during each school day at each school in the district, to recite:

(1) *the pledge of allegiance to the United States flag in accordance with 4 U.S.C. Section 4, and its subsequent amendments*; and

(2) the pledge of allegiance to the state flag in accordance with Subchapter C, Chapter 3100, Government Code.

(c) On written request from a student's parent or guardian, a school district shall excuse the student from reciting a pledge of allegiance under Subsection (b).

(d) The board of trustees of each school district shall provide for the observance of one minute of silence at each school in the district following the recitation of the pledges of allegiance to the United States and Texas flags under Subsection (b). During the one-minute period, each student may, as the student chooses, reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another student. Each teacher or other school employee in charge of students during that period shall ensure that each of those students remains silent and does not act in a manner that is likely to interfere with or distract another student.

TEX. EDUC. CODE ANN. § 25.082 (Vernon 2003) (emphasis added).

Utah

53A-13-101.6 Instruction on the flag of the United States of America.

(1) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the State

> Board of Education shall provide by rule for a program of instruction within the public schools relating to the flag of the United States.
>
> (2) The instruction shall include the history of the flag, etiquette, customs pertaining to the display and use of the flag, and other patriotic exercises as provided by Sections 36 U.S.C. 170 to 177.
>
> (3) (a) The pledge of allegiance to the flag shall be recited: (i) at the beginning of the day in each elementary public school in the state; and (ii) once a week at the beginning of a school day in each public secondary school in the state.
>
> (b) Each student shall be informed by posting a notice in a conspicuous place that the student has the right not to participate in reciting the pledge.
>
> (c) A student shall be excused from reciting the pledge upon written request from the student's parent or legal guardian.

UTAH CODE ANN. § 53A-13-101.6 (2003) (emphasis added).

Virginia

§ 22.1-202. Instruction in history and principles of flags of United States and Virginia; pledge of allegiance to American flag; guidelines developed by the Board

> A. Instruction in the history and principles of the flag of the United States and the flag of the Commonwealth shall be given in one or more grades in every school division. The instruction shall include the *pledge of allegiance* and the appropriate etiquette and conventions for

respecting the dignity and appropriate display of such flags.

In recognition of the civic heritage of the United States of America, all students shall be required to learn the *Pledge of Allegiance* and to demonstrate such knowledge.

B. To promote compliance with constitutional restrictions as well as observance of constitutional rights, the Board of Education shall, in consultation with the Office of the Attorney General, develop guidelines on constitutional rights and restrictions relating to the recitation of the *pledge of allegiance to the American flag* in public schools.

The Board's guidelines shall include, but shall not be limited to, provisions which address the following: the initiative and involvement of local school boards, individual schools, administrators, teachers, and students; the propriety and constitutionality of any recitation or participation requirements; appropriate etiquette and conventions for respecting the dignity and appropriate display of the flag of the United States and the flag of the Commonwealth; and relevant state and federal constitutional concerns, such as freedom of speech and religion. . . .

C. Each school board shall require the daily recitation of *the Pledge of Allegiance* in each classroom of the school division and shall ensure that the flag of the United States is in place in each such classroom. Each school board shall determine the appropriate time during the school day for the recitation of the Pledge. During such Pledge of Allegiance, students shall stand and recite the Pledge while facing the flag with their

> right hands over their hearts or in an appropriate salute if in uniform; however, no student shall be compelled to recite the Pledge if he, his parent or legal guardian objects on religious, philosophical or other grounds to his participating in this exercise. Students who are thus exempt from reciting the Pledge shall remain quietly standing or sitting at their desks while others recite the Pledge and shall make no display that disrupts or distracts others who are reciting the Pledge. School boards shall provide appropriate accommodations for students who are unable to comply with the procedures described herein due to disability.

VA. CODE ANN. § 22.1-202 (Michie Supp. 2002) (emphasis added).

Washington

28A.230.140. United States flag – Procurement, display, exercises – National anthem

> The board of directors of every school district shall cause a United States flag being in good condition to be displayed during school hours upon or near every public school plant, except during inclement weather. They shall cause appropriate flag exercises to be held in each classroom at the beginning of the school day, and in every school at the opening of all school assemblies, at which exercises those pupils so desiring shall recite the following salute to the flag: "*I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all*". Students not reciting the pledge shall maintain a respectful silence. The salute to the flag or the national anthem

> shall be rendered immediately preceding inter-school events when feasible.

WASH. REV. CODE § 28A.230.140 (2000) (emphasis added).

West Virginia

§ 18-5-15b. Pledge of allegiance to the flag

> Every instructional day in the public schools of this state shall be commenced *with a pledge of allegiance to the flag of the United States*. Pupils who do not wish to participate in this exercise shall be excused from making such pledge.

W.VA. CODE § 18-5-15b (1999) (emphasis added).

Wisconsin

118.06. Flag, pledge of allegiance, and national anthem

> (1) Every school board and the governing body of every private school shall cause the U.S. flag to be displayed in the schoolroom or from a flagstaff on each school ground during the school hours of each school day.
>
> (2) Every public school shall offer the *pledge of allegiance* or the national anthem in grades one to 12 each school day. Every private school shall offer *the pledge of allegiance* or the national anthem in grades one to 12 each school day unless the governing body of the private school determines that the requirement conflicts with the school's religious doctrines. No pupil may be compelled, against the pupil's objections or those

of the pupil's parents or guardian, to recite the pledge or to sing the anthem.

WIS. STAT. ANN. § 118.06 (West Supp. 2002 Electronic Update) (emphasis added).

(12) (13)

Nos. 02-1574 & 02-1624

Supreme Court, U.S.
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In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL A. NEWDOW, et al.,

Respondents.

ELK GROVE UNIFIED SCHOOL DISTRICT, and DAVID W. GORDON, Superintendent, EGUSD,

Petitioners,

v.

MICHAEL A. NEWDOW,

Respondent.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, THE CENTER FOR PUBLIC JUSTICE, AND CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the inclusion of the phrase "under God" in the Pledge of Allegiance to the United States Flag violates the Establishment Clause of the First Amendment.

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are religious organizations that believe that the ultimate basis for religious liberty, as well as for all other inalienable rights, rests in the fact that individuals are "endowed by their Creator" with such rights, as stated in the Declaration of Independence. The *amici* further agree that only this fact adequately constrains the authority of government with respect to the exercise of inalienable rights. Finally, the *amici* agree that the government may affirm the fact that inalienable rights come from God without violating the religious neutrality that such rights impose upon government.

On behalf of its membership of Christian attorneys, law students, judges, and law professors, Christian Legal Society believes that the clause "under God" in the Pledge of Allegiance is an important affirmation of the basis for this nation's concept of limited government that is the basis of our legal system.

The Center for Public Justice is a national, public policy and civic-education organization that advocates the equal treatment of all faiths in the public square. For 25 years the Center has been advancing the case for the free exercise and non-establishment of religion in public as well as in private life.

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party. The Alliance Defense Fund has made a monetary contribution towards the preparation and submission of this brief.

Christian Educators Association International was founded in 1953 and became the first national organization of professional Christian educators serving in public, private and charter schools. CEAI currently has a national membership of approximately 7,500 professional educators, the majority of whom serve in public educational institutions. CEAI is a leader in promoting the rights of religious persons in public education and has actively promoted a "Declaration for Public Education" which encourages local church and community organizations to be active participants and supporters of public schools.

Statements of interest specific to each *amicus* are found in the Addendum.

SUMMARY OF ARGUMENT

Considered in its context, the clause "under God" in the Pledge of Allegiance represents not an endorsement of monotheism, but rather a proposition from the Declaration of Independence that is both theological and political, namely, that all individuals are "endowed by their Creator with certain unalienable rights." The clause was adopted to affirm the basis for this country's concept of limited government.

Even though the clause refers to a particular theological proposition, it does not implicate the Establishment Clause neutrality requirement. The focus of Establishment Clause neutrality is on government action and policy at the "operational" level, not on the principles underlying such action and policy (where in fact neutrality is not possible). Indeed, the neutrality requirement itself relies upon the religious doctrine that genuine religious faith

cannot be coerced. Therefore, the neutrality requirement should not be construed to prohibit the government from affirming the principles upon which the requirement depends merely because such principles are religious in nature. To hold that the government cannot affirm such principles would ultimately weaken protection for religious liberty and other inalienable rights by undermining the basis for such rights.

ARGUMENT

I. THE CLAUSE "UNDER GOD" AFFIRMS THIS COUNTRY'S SYSTEM OF LIMITED GOVERNMENT.

The court below correctly asserted that the clause "under God" is "normative," but it incorrectly characterized the normative principle as an endorsement of monotheism. Appendix to the Petition for a Writ of Certiorari (hereinafter "App.") at 11a-12a. The relevant normative principle is, rather, one of limited government grounded in the concept that individuals are endowed by God with certain inalienable rights. Put differently, the clause asserts that government is not the highest authority in human affairs.

A. THIS COUNTRY'S FOUNDERS GROUNDED LIMITED GOVERNMENT IN THE PROPOSITION THAT INALIENABLE RIGHTS COME FROM GOD.

There can be little doubt that this country's founders believed that the authority of government must be limited

with respect to certain inalienable rights given to individuals by God. The existence of such rights is affirmed perhaps most succinctly and powerfully in the Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. That to secure these Rights, Governments are instituted among Men . . . .

The Declaration of Independence, ¶ 2 (U.S. 1776).

The right to religious liberty, sometimes referred to as our "First Freedom," provides perhaps the paradigmatic example of limited government with respect to an inalienable right. *See generally* Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?*, 21 Cardozo L. Rev. 1243 (2000). The Founders started from the twin propositions that duty to God transcends duty to society and that true religious faith cannot be coerced. These propositions are reflected in James Madison's *Memorial and Remonstrance Against Religious Assessments*:

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe[.]

Everson v. Board of Educ. of Ewing, 330 U.S. 1, 64 (1947) (appendix to dissenting opinion of Rutledge, J.). Thomas Jefferson incorporated the same propositions into the Virginia Act for Religious Freedom, which begins:

"Whereas, Almighty God hath created the mind free." Va. Code Ann. § 57-1 (West 2003). The Act continues by stating that any attempt by the government to influence the mind through coercion is "a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do . . . ." *Ibid.*

The Founders argued that because individuals possess an inalienable right and duty to worship God as they deem best, government can have no authority over religious exercise as such. In more general terms, the scope of governmental authority over individuals is inherently limited with respect to their exercise of inalienable rights given by God. McConnell, *supra*, at 1247.

B. THE CLAUSE "UNDER GOD" WAS ADOPTED TO DISTINGUISH OUR SYSTEM OF LIMITED GOVERNMENT FROM THE COMMUNIST SYSTEM.

The reliance upon God as the source of inalienable individual rights is the most fundamental distinction between the political theory underlying our democratic republic and the Marxist-Leninist theory underlying the communist regime of the former Soviet Union. As the conference report makes clear, it is this distinction that Congress wished to emphasize when it added the clause to the Pledge of Allegiance:

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of

> the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.

H.R. Rep. No. 83-1693, at 1-2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340.

Following, as it does, the discussion of inalienable rights endowed by God, the reference in the report to "dependence . . . upon the moral directions of the Creator" should be understood as another way of saying that our political system relies upon the moral norms of inalienable rights that come from God.[2] The conference report suggests that by acknowledging a source of authority above government, such moral norms limit the power and scope of government and offer a principled basis for protection of individuals against the power of government. Congress sought to contrast this theory with that of the communist system which cannot rely upon such norms to limit government and protect individuals.

---

[2] *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) ("[W]hen there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue.").

II. GOVERNMENT MAY AFFIRM A RELIGIOUS BASIS FOR INALIENABLE RIGHTS WITHOUT VIOLATING THE RELIGIOUS NEUTRALITY REQUIRED BY SUCH RIGHTS.

There is no doubt that the Establishment Clause requires the government to maintain a position of neutrality with respect to religion. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 651-53 (2002). But when choosing among foundational principles, the government cannot be neutral. As one commentator has put it:

> Madison . . . sought equal religious liberty at what might be called the operational level: how government actually treats citizens of different religious and non-religious persuasions. He did not, and no one can, seek total equality or neutrality at the justificatory level. The operational rule adopted by government must inevitably rest on some view or combination of views about the role of the state and the nature of religion, and some views will be rejected at that level.

Thomas C. Berg, *Religion Clause Anti-Theories*, 72 Notre Dame L. Rev. 693, 730 (1997).

The Establishment Clause neutrality requirement itself is based on a particular religious proposition that emphasizes private religious choice. Berg, *supra*, at 732. This proposition in turn is based upon the proposition that inalienable rights, including the right to religious exercise, come from God. McConnell, *supra*, at 1247. Although this choice of foundational propositions is not neutral with respect to religion, it does lead to neutral treatment of religion (and non-religion) at the operational level. In the same way, reliance on religious doctrine to ground other

civil rights does not violate Establishment Clause neutrality at the operational level.

Further, the Establishment Clause cannot be read to prohibit the government from expressly affirming the underlying principles upon which it relies merely because such principles may have religious substance. A statement of political theory with religious content must be distinguished from prayers and other religious exercises in which the government may not engage. *See, e.g., Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962). Put differently, there is a fundamental difference between a statement that "there is one and only one God" and a statement that "inalienable rights come from God." To the extent that the clause "under God" refers to the proposition that inalienable rights come from God, the clause is a statement of foundational principle about which the government cannot be neutral. This is the one type of statement with substantive religious content that the government may affirm because it is the foundation upon which rests the requirement that the government must in all other respects be neutral toward religion.

III. GOVERNMENTAL AFFIRMATION OF THE RELIGIOUS BASIS FOR INALIENABLE RIGHTS PROTECTS RELIGIOUS LIBERTY.

By prohibiting the government from affirming underlying principles with religious content, the reading of the Establishment Clause by the court below would render unconstitutional the Declaration of Independence and the Virginia Act for Religious Freedom, both of which expressly rely upon particular religious propositions. Ironically, such a reading would strike down Jefferson's groundbreaking law establishing religious liberty on the

basis that it violates the very principles of religious liberty it established.

Apart from these untenable results, the analysis of the court below would unmoor religious liberty from its underlying rationale. As one commentator has suggested:

> [W]ithout a plausible rationale for the commitment to religious liberty we cannot understand what that commitment entails. It is commonplace that legal enactments should be interpreted to effectuate their purposes. But a law's "purpose" arises out of, and is a projection of, its justification. Therefore, if we cannot articulate a convincing justification for the commitment to religious freedom then we cannot know its purpose, and we are accordingly paralyzed in our efforts to interpret the commitment.

Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. Pa. L. Rev. 149, 223 (1991).

Fortunately, this Court has never adopted the reasoning of the court below. Indeed, in *Wallace v. Jaffree*, 472 U.S. 38 (1985), this Court relied upon the theological doctrines that underlie the First Amendment when it noted that religious liberty "derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful. . . . " *Wallace*, 472 U.S. at 53. Freedom of conscience and the importance of uncoerced religious belief are fundamentally religious propositions. *See* McConnell, *supra*, at 1250-51; Smith, *supra*, at 154. The Court has consistently invoked such religious concepts to protect religious liberty. *See, e.g., Engel,* 370

U.S. at 432 ("[R]eligion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."). Indeed, the Court has expressly observed that this country's "institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Whether through reliance by the courts on religious propositions or through the clause "under God" in the Pledge of Allegiance, governmental affirmation of the fundamental principles underlying religious liberty and other inalienable rights serves to strengthen the protection of such rights.

CONCLUSION

The court below held that the clause "under God" results in governmental coercion of religious practice. App. at 11a. *Amici* agree with the dissent below that, although relying on "elements and tests," the court below seemingly failed to consider "the good sense and principles that animated those tests in the first place." App. at 23a (Fernandez, J., concurring in part and dissenting in part). Therefore, *amici* respectfully request that the petitions for

a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Respectfully submitted,

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ADDENDUM

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 140 accredited law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation.

The Center strives to preserve religious freedom in order that men and women might be free to do God's will. Using a network of volunteer attorneys and law professors, the Center provides information to the public and the political branches of government concerning the interrelation of law and religion. Since 1980, the Center has filed briefs *amicus curiae* in defense of individuals, Christian and non-Christian, and on behalf of religious organizations in virtually every case before the Supreme Court involving church/state relations.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive, Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by

the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law. . . ."

The Christian Legal Society's national membership, years of experience, and available professional resources enable it to speak with authority upon religious freedom matters before this Court.

The Center for Public Justice is a national, public policy and civic-education organization that advocates the equal treatment of all faiths in the public square. For 25 years the Center has been advancing the case for the free exercise and non-establishment of religion in public as well as in private life.

Christian Educators Association International was founded in 1953 and became the first national organization of professional Christian educators serving in public, private and charter schools. CEAI currently has a national membership of approximately 7,500 professional educators, the majority of whom serve in public educational institutions. CEAI is a leader in promoting the rights of religious persons in public education and has actively

promoted a "Declaration for Public Education" which encourages local church and community organizations to be active participants and supporters of public schools.